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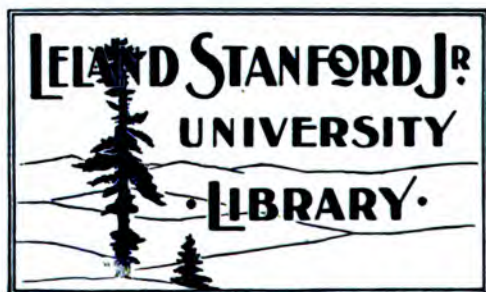
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THE
AMERICAN
RAILWAY REPORTS:

A COLLECTION OF
ALL REPORTED DECISIONS RELATING TO
RAILWAYS.

BY
J. HENRY TRUMAN,
OF THE CHICAGO BAR.

VOL. I

NEW YORK:
JAMES COCKCROFT & COMPANY,
LAW PUBLISHERS, 27 GREAT JONES STREET.
1873.

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PREFACE.

THE published reports of the decisions of courts of final resort in this country have now reached the number of sixty to seventy volumes a year. And of the mass of law thus enunciated annually, a considerable share, touching the more general topics, is authoritative and applicable in every State. Consider, besides, the increasing volume of judicial decisions, and their general application, the number of unexpected constructions and modifications both new statutes and old rules are constantly receiving from the different tribunals, and the fact that, despite all legal apothegms, the general body of the law is undergoing rapid changes by manipulations of the courts, to suit the exigencies of a progressive age, and both the importance of having an intimate acquaintance with all the latest decisions on any subject, and the practical impossibility of acquiring such acquaintance, or, in fact, any complete knowledge of them, until they have been compiled into digests or filtered through the hands of honest writers into treatises, will be apparent.

To supply this manifest want as to one subject, at least, the series of *Railway Cases*, of which the first volume is now presented, has been devised.

The topic was chosen from among many, all urgently claiming some attention, as being comparatively new, affecting great interests, embracing many diverse opinions, and also as being one of which the Law is being made with a rapidity and

in quantity beyond the compass of selected cases, or legal periodicals.

The purpose of this series is to commence at July 1, 1872, and from the cases contained in this volume, and publish *every* decision pertaining to Railway Law rendered in any court of final jurisdiction in the United States, concurrently with their publication in the several States where they may occur.

To attain this end, a careful record is being kept of every case decided, from which coming volumes will be compiled.

The variety of phases which the subject assumes in the various decisions make a strict topical arrangement of them, in any one volume of a continuing series, impossible, and no division of the cases into classes has been attempted, but they have been grouped with a view to their subject matter; *First*, those relating to the organization of Railroad Companies; *Second*, their corporate rights and liabilities as citizens and property owners; *Third*, the relation between such corporations and their stockholders; *Fourth*, their liability as common carriers of goods and passengers; and finally, their liability for injuries to the persons or property of strangers: an order more natural and convenient, it is believed, than a classification by the arbitrary rules of chronology.

The cases themselves, wherever the circumstances and inclination of the Reporters would permit, have been reproduced here in the same form, with the same statement and syllabus, as they are to appear in the several State Reports. While by following this method the always desirable uniformity of style and appearance has been sacrificed, a substantial advantage has been obtained by preserving the identity of many of the cases, it being believed that the least possible alteration of the original text of the decisions as they will be published in the State Reports secures for them the highest value as authority, and avoids any necessity of reference to other books.

The Editor is keenly sensible of the many features of this present volume open to criticism. Many of these may be re-

moved on further experience, or it may be necessary to change the entire *form*, but the scheme and purpose of the series cannot, he feels assured, fail to commend themselves to the profession.

An unforeseen and unavoidable occurrence has delayed the appearance of this volume far beyond its time, bringing it almost upon the second volume, which is now in preparation; and as an early publication of these cases is considered a substantial feature of their merit, such delay is greatly regretted, and will in future be most guarded against.

Both the Editor and such of the profession as find this series useful are greatly indebted to the favor and courtesy of the following gentlemen for opinions and notes furnished, or used by their permission, in preparing this volume: Hon. Norman L. Freeman, of Illinois; E. H. Styles, Esq., of Iowa; Hon. W. C. Webb, of Kansas; Hon. Hoyt Port, of Michigan; Hon. J. S. Morris, of Mississippi; John M. Shirley, Esq., of New Hampshire; P. Frazer Smith, Esq., of Pennsylvania, and G. Veasey, Esq., of Vermont.

J. H. T.

CHICAGO, *August 1*, 1878.

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AMERICAN RAILWAY REPORTS.

THE MANSFIELD, COLDWATER & LAKE MICHIGAN RAILROAD COMPANY v. CLARK.

23 Mich. 519.

Petition to acquire land for railroad purposes.—Description of premises.

A petition by a railroad company to acquire title, for railroad purposes, to lands used and occupied as a street, which does not disclose whether said lands are designed to be appropriated as the property of the respondent, or whether they were included in the petition for the purpose of having an assessment of the respondent's damages by reason of his ownership of premises fronting on the street, is fatally defective.

Report of jury.—Title to lands sought to be condemned for railroad.

An award of a jury in such case, which disclosed that the jury assessed the damages which they thought the respondent entitled to on account of his "claiming" to own certain land, used and occupied as a street, without determining whether in fact he did own it, and from which it does not appear whether the damages awarded were the estimated value of the land or only that of some doubtful claim they supposed him to be setting up, cannot be sustained.

What not a finding of necessity of taking for public use. A finding in the verdict of a jury in such case that "it is necessary that said real estate and property should be taken for purposes of said company," is not such a finding of the necessity for the taking of said property for the public use, either in form or substance, as is required by the constitution. *Article XVIII. § 2.*

Requisites of report of jury as to public use. The report of the jury or commissioners, in such cases, must distinctly find that the taking is necessary for the public use and benefit; and to make such a report they must be satisfied not only that the particular land is

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needed for the construction of the work, but also that the work itself is one of public importance.

Qualifications of jurors.—Freeholders. When the claimant was present at the impanneling of the jury, and no challenge was interposed, the objection to the confirmation of the report of the jury, that the jurors are not affirmatively shown to be freeholders, in the absence of any showing that any of them were disqualified, is not well taken.

Proper course to summon jury of particular qualification. The proper course, when a jury is required of persons possessing a particular qualification, is for the order of the court to direct the summoning of such persons.

Appeal from Branch circuit.

This was a petition by the railroad company, against Orsamus B. Clark, to acquire title to certain lands. The description of the premises, required to be taken, in said petition, is as follows, viz :

“That the following real estate and property in said county is required by your petitioner for the purpose of constructing and operating its said proposed road, to wit: That part of the first three lots lying on the north side of Railroad-street, and next east of Division-street, in the city of Coldwater, in said county of Branch, which is within one rod of the center line of said railroad, as surveyed, located and staked across the same, said center line entering the same on the east line of Division-street, at a point which is one hundred and fifty-three feet northerly of the center of the Lake Shore & Michigan railroad track, at a point where the east line of Division-street crosses ; thence south seventy-five degrees thirty-eight minutes east, four hundred and sixty and one-half feet to the north line of the said Lake Shore & Michigan Southern Railroad Company's right of way as now fenced, but the last two hundred and twenty-two and one-half feet mentioned is used and occupied as a public highway called Railroad-street aforesaid, said strip of land containing eighteen one-hundredths of an acre, excluding that part thereof

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used for Railroad-street aforesaid, and belongs to Orsamus B. Clark, of the city of Coldwater aforesaid."

The report of the jury was as follows, viz :

" We, the undersigned jury, struck and summoned under and by virtue of an order of said court, made the 12th day of August, A. D. 1871, to ascertain and determine the necessity of said company's taking and using for the purpose of constructing, operating and maintaining their railroad, the following described real estate and property, to wit: That part of the first three lots lying on the north side of Railroad-street, and next east of Division-street, in the city of Coldwater, in said county of Branch, which is within one rod of the center line of said railroad, as surveyed, located and staked across the same, said center line entering the same on the east side of Division-street, at a point which is one hundred and fifty-three feet northerly of the center of the Lake Shore & Michigan Southern railroad track at a point where the east line of Division-street crosses; thence south seventy-five degrees thirty-eight minutes east, four hundred and sixty and one-half feet to the north line of the said Lake Shore & Michigan Southern railroad company's right of way as now fenced; but the last two hundred and twenty-two and one-half feet mentioned is used and occupied as a public highway called Railroad-street aforesaid.

" The amount of land embraced in said description, and to which title is sought to be acquired is (excluding Railroad-street) eighteen one-hundredths acres, said premises being owned by Orsamus B. Clark aforesaid, of Branch county, in the State of Michigan. The said Orsamus B. Clark also claimed before us to own that portion of said strip of land, two hundred and twenty-two and one-fourth feet in length, which is used and occupied as Railroad-street aforesaid, and we have included in our award (below) the damages and compensation he is entitled to for the same being taken and

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used for the purpose aforesaid, and to ascertain and determine the damages and compensation to be allowed therefor, respectfully report:

"That we met at the time and place appointed therefor by the court, and after having taken and subscribed the oath required by law, and all of the jury being present and acting together during the proceedings, and under charge of the officer appointed for that purpose, we viewed said real estate and property above described, and after hearing the allegations and proofs of the parties, and having taken and reduced the testimony to writing (minutes of which are hereto annexed), we deem that it is necessary that said real estate and property should be taken for the purposes of said company, and we do ascertain and determine the damages and compensation which ought justly to be made by said company, on account of such taking and use of the same for the purpose of constructing and operating their railroad, to the owners of, and persons interested in, said real estate and property, to be as follows:

"We award to Orsamus B. Clark the sum of one hundred and ten dollars and forty cents.

"Done this 18th day of August, 1871, in the city of Coldwater, State of Michigan."

The respondent brought the matter to this court by appeal.

John B. Shipman, for the petitioner.

E. G. Fuller and Ashley Pond, for the respondent.

COOLEY, J.—The difficulty with the description in the petition in this case, is that we are unable to determine from it whether that portion of the land described as being used and occupied as Railroad-street was designed to be appropriated as Clark's property or not.

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The manner in which it is referred to would rather lead to the inference that it was included in the petition, not because it was Clark's property, but in order that his damages by reason of his ownership of premises fronting on the street might be assessed. But if this were the purpose, the petition would be defective in not showing that he owns any such premises. The jury appear not to have fully understood the matter, but inasmuch as Clark "claimed" to own this piece of land, they assessed the damages they thought him entitled to; but whether they gave the value of the land, or only the value of some doubtful claim they supposed him to be setting up, we are not informed. It is not "claims" which are to be appropriated under the statute, but lands; and a party might be seriously wronged if his freehold might be taken on an award by the jury of a mere nominal compensation, because of their want of faith in the validity of his title. Questions of title to the land appropriated are not to be determined by this jury, but may come up in a proceeding to settle the right to the money awarded.

We think also that the judgment of the jury is defective in that it does not find the necessity for the taking of this property for the public use. What they say is that "it is necessary that said real estate and property should be taken for the purposes of said company." This is not the finding required by the constitution, either in form or substance. If the routes for railroads were prescribed by the legislature, the public necessity for their construction, and for the taking of the necessary land for the purpose, would be thereby determined; but when the associated projectors may select their own line, it is obviously possible that the company may have purposes in which the public have no interest whatever. Indeed it is quite possible for a railroad to be as much a private way as any other, if the shortness of the line and the interests that can be

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accommodated by it are such only as preclude its supplying a public need. In such a case it was never contemplated by the constitution that land should be taken against the will of the owner, on a claim of public interest, for a road in which the public had no concern. It would be contrary to the first principles of right to permit any seven or other number of men to lay out a road wherever they might choose, and then to appropriate lands for its purposes, without any finding by a disinterested tribunal that the road was needed.

The constitution provides that "when private property is taken for the benefit and use of the public, the necessity for using such property . . . shall be determined by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record as shall be prescribed by law." *Art. XVIII. § 2.* Under this provision no use can be deemed public upon a mere assumption by interested parties that it is so; and a finding that the taking is needful to the proposed enterprise is not the same as a finding that it is for the use or benefit of the public. The report of the jury or commissioners must distinctly cover this point in every case; and they cannot properly make one which will warrant the taking of the land, unless satisfied not only that the particular land is needed for the construction of the work, but also that the work itself is one of public importance. See *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 *N. Y.* 137.

The objection to the confirmation of the report, that the jurors are not affirmatively shown to be freeholders, is not well taken. No challenge was interposed, nor has there been any showing that any of the jurors were disqualified. On the contrary, the claimant expressed himself satisfied with the jury when they were impaneled. The case of *Peninsular R. R. Co. v. Howard*, 20

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Mich. 18, is not in point, for in that some of the persons summoned were shown to be disqualified, and the objection was taken as soon as the party became aware of the facts. Had there been no appearance of the claimant, or no facts operating as a waiver, the case would have been different. The proper course, however, when a jury is required of persons possessing a particular qualification, is for the order to direct the summoning of such persons. This is only an ordinary application of the general and very just rule, that in proceedings to take the property of the citizen against his will, all the conditions to the taking which have been prescribed by the law must affirmatively appear to have existed. *People v. Highway Commissioners of Nankin*, 14 *Mich.* 528.

Although it was not necessary to a decision that we should do so, we have considered the whole case presented by this record, because of the frequency of these assessments, and the great public and private interests involved. The proceedings under review being void for want of a proper petition, they will be set aside, with costs.

CAMPBELL, Ch. J., and CHRISTIANCY, J., concurred.

GRAVES J., did not sit in this case.

Hannibal & St. Joseph R. R. Co. v. Muder.

HANNIBAL & ST. JOSEPH RAILROAD COMPANY v. MUDER.

49 Mo. 165.

Eminent domain.—Railroads.—Statute.—What uses public. The Hannibal & St. Joseph R. R. Co. are authorized under the statute (*Wagn. Stat.* 298, § 2, subd. 7) and charter (§ 5), to condemn land for purposes of depots, engine houses and repair shops. Such use is a public use, for which property may be taken against the owner's consent.

Railroads.—Condemnation of lands.—Proceedings for.—Allegations in. In proceedings to condemn land for railroad purposes, an allegation in the petition that the parties could not agree upon the proper compensation to be paid for the land proposed to be taken, is a sufficient averment of the fact of disagreement to put the adverse party upon his defense upon the merits.

Eminent domain.—Benefits, assessment of.—Exceptions, &c. Where proceedings of commissioners appointed to assess damages for taking of railroad lands are regular, and there is nothing to show that they erred in the principles upon which their valuation was made, exceptions to the proceedings should be overruled.

Error to Marion circuit court.

James Carr, for defendant in error.

H. J. Drummond, for plaintiff in error.

BY THE COURT. — CURRIER, J. — This was a proceeding under the statute to condemn for the plaintiff's use two parcels of ground lying within the corporate limits of the city of Palmyra. One of these parcels, as the petition shows, was required for a roadway in connecting the tracks of the plaintiff's railroad, and the other for a site for a depot, engine house

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and repair shops. In accordance with the prayer of the petition, commissioners were appointed, who in due time returned into court a report of their proceedings. One of the defendants, Muder, filed exceptions to this report, urging, among other grounds of objection to it, this: that the statute does not authorize the condemnation of land for the proposed building site, and that the use proposed was not a public use for which private property could be taken against the owner's consent.

The plaintiff's charter, section 5, authorizes it to take and hold lands for "depots, landing places or wharves, engine houses, offices, machine shops, water houses and water stations." The general law in relation to railroad corporations (*Wagn. Stat.* 298, § 2) also provides that such corporations may "erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of their passengers, freight and business." There is no mistaking the object of these provisions. In Illinois, where the statute is much less specific, it is held that the grant by the legislature of the right to construct a railroad with such "appendages" as might be deemed necessary and convenient for its successful operation, vested the company with power to acquire land through the process of condemnation for turn-outs, depots, engine houses, shops and turn-tables; these things, in the judgment of the court, being necessary conveniences in conducting the business of a railroad corporation. *Chicago, Burlington & Quincy R. R. v. Wilson*, 17 *Ill.* 123; *Low v. Galena & Chicago R. R.*, 18 *Ill.* 324.

The adjudications in New Jersey and Louisiana on this subject are to the same effect. 3 *Zabr.* 510; 1 *La. Ann.* 128. The principle of the decision in *Eldridge v. Smith*, 34 *Vt.* 484, is in harmony with the other decisions referred to. All these adjudications proceed upon the assumption that the appropriation of land for the purposes stated in the plaintiff's petition, is an

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appropriation of private property to a public use. See further on this subject, 1 *Redf. Railw.* ch. 11, where the authorities are collected and elucidated.

As to the petition and proceedings under it, I discover no substantial error or defect. The petition alleges, in the language of the statute, that the parties could not agree upon the proper compensation to be paid for the land proposed to be taken ; and that was a sufficient allegation of the fact of disagreement to put the adverse party upon his defense upon the merits. The proceedings of the commissioners were regular, and there is nothing to show that they erred in the principles upon which their valuation was made. The exception on that subject was therefore properly overruled. *St. Louis & St. Joseph R. R. Co. v. Richardson*, 45 *Mo.* 466.

The judgment will be affirmed.

The other judges concurred.

THE CHICAGO AND MICHIGAN LAKE SHORE RAILROAD COMPANY v. SANFORD.

23 *Mich.*

Inquest of damages under general railroad law.—Verdict must be unanimous. The verdict of a jury of inquest, under the general railroad law, must be unanimous, and a verdict signed by less than all is a nullity.

What requisite in petitions in such proceedings.—Each parcel of land must be described.—Inability to agree with owner. Under the statute, as amended, the petition need not show an intention to build the entire road, if a division of fifteen miles has been lawfully

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designated; but in such a case it must appear in the petition affirmatively that such division has been lawfully made in such a manner as to conform to the statute.

When the land of several persons is sought to be appropriated, each parcel must be distinctly described, and the purpose for which it is wanted, and reasons why it is necessary to proceed under the statute to take it must be given. Parcels may not all be needed for the same purpose, and the same reasons for proceeding adversely may not exist in all cases.

The fact of inability to agree with the owner is jurisdictional, and may be controverted like any other fact.

General finding of single sum for land of several owners invalid. Each owner has a right to have a finding as to the value of his land and the necessity of taking it; and a general finding, giving a single sum for taking the land of several owners, is invalid.

Practice in supreme court.—Petition too defective to maintain proceedings. A petition not distinguishing the land of several owners, nor showing the cause of proceeding against each, is too defective to maintain proceedings, and when a verdict under it is set aside, the case cannot be referred back to a new jury, but the parties must proceed by a new application.

Appeal from the probate court of Berrien county.

This is an appeal of Whitfield Sanford from proceedings on the part of the Chicago and Michigan Lake Shore Railroad Company against said Whitfield Sanford and Andrew Crawford, Andrew H. Green and William Ferguson to condemn certain lands, in which they were interested, in the village of Benton Harbor, for the use of said road.

The petition in the case was as follows, viz :

“Your petitioner, the Chicago and Michigan Lake Shore Railroad Company, respectfully shows that the Chicago and Michigan Lake Shore company is a duly organized company, and was organized under and by virtue of an act entitled “An act to provide for the organization of railroad Companies,” approved February 12, 1855, and the amendments thereto; that it is the intention of said railroad company, in good faith,

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to construct and finish a railroad from lot eighty-seven, in the village of St. Joseph, in the county of Berrien, to the north line of section five, in the township of Columbia, in the county of Van Buren, in said State, the same being designated as division number two, of the Chicago and Michigan Lake Shore Railroad; that the capital stock of said company has been in good faith subscribed as required by the terms of said act, and the amendments thereto; that said company has surveyed the route of its proposed road in said county of Berrien, and made a map and survey thereof, by which said route is designated, and that they have located their said road according to such survey, and filed a certificate thereof, signed by a majority of the directors of said company, together with a map and survey of its said proposed railroad, in the office of the register of deeds of the said county of Berrien; that the property hereinafter described is required for the purpose of constructing, operating or repairing the said proposed railroad or its appurtenances, and that the said Chicago and Michigan Lake Shore Railroad company has not been able to acquire title thereto by voluntary conveyance or for such price or sum as the said company is willing to pay, or believe it ought of right to pay, therefor; that most of the persons claiming an interest in said premises and claiming the principal interest therein, are not residents of the State of Michigan; and your petitioner has not been able to acquire the title thereto, by reason of such non-residence, and further, for the reason that the persons claiming most of the title in fee thereto, refuse to grant the same, except on such terms and conditions as your petitioner deems unjust and unreasonable, and greatly to the lasting detriment and injury of your petitioner, or at an exorbitant price therefor; that said tracts or parcels of land are described as follows, to wit: The southeast quarter of section thirteen, in township four

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south, of range nineteen west, in the county of Berrien, State of Michigan ; and so much of the west half of the west half of the southwest quarter of section eighteen, in township four south, of range eighteen west, in said county, as lies north of the westerly line of Water-street, in the village of Benton Harbor, as by the recorded plat of said village, and south of a five rod strip on the north side of said quarter section ; that the center line of said proposed railroad as now surveyed and located by the said railroad company, reference being had to the map and survey thereof, now on file in the office of the register of deeds for said county of Berrien, enters the first of said described tracts or parcels of land, on the west line thereof, two hundred and four feet north of the southwest corner thereof, running thence north seventy-nine degrees east, magnetic, two thousand and three feet to a tangent point ; thence on a three degree curve to the north with one thousand nine hundred and ten feet radius, six hundred and ninety-seven feet, to the point of departure from the same, on the east line thereof, distant six hundred and ninety-five feet north of the southeast corner of the same ; and enters said last described tract or parcel of land on the west line thereof, six hundred and ninety-five feet north of the south west corner of said section eighteen aforesaid, running thence easterly on the curve line above described six hundred and fourteen feet to a tangent point, thence north thirty-nine degrees, forty minutes east, magnetic, two hundred and fifteen feet, more or less, to the point of departure therefrom, on the east line thereof, distant one thousand two hundred and thirty feet north of the south line of said section eighteen.

“And your petitioner further shows that for the purpose of constructing, operating or repairing the said proposed railroad or its appurtenances, it is necessary to have, and they seek to acquire, so much of said first

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described tract of land as lies within three rods on each side of said center line as above described, embracing one and six-tenths acres of land ; and so much of said last described tract as lies within three rods on each side of said center line, from the west side of said tract easterly, six hundred and fourteen feet, more or less, to the west side of the street or highway running north from the said village of Benton Harbor, commonly called the town line road, and for general depot purposes so much thereof as lies within one hundred and fifty feet on each side of said center line, from the west side of said street or highway to the east line of said tract, and embracing two and nine-tenths acres.

“And your petitioner further shows that the persons and their residences, so far as the same can with reasonable diligence be ascertained, owning or having, or claiming to own or have, estate or interest in the said premises, or in some part thereof, are as follows, to wit: Whitfield Sanford of Geneseo, in the State of Illinois ; Andrew Crawford of Geneseo, in the State of Illinois ; Andrew H. Green of the city of New York, in the State of New York, and William Ferguson of Benton Harbor, Berrien county, and State of Michigan.

“Your petitioner, therefore, prays for an order appointing three commissioners as provided by the terms of said act, and the amendments thereto, to ascertain and determine the necessity of taking and using the said property and franchises, as hereinbefore described, for the purposes aforesaid, and if they deem the same necessary to be taken for the purposes aforesaid, that they may then ascertain and determine the damages or compensation, which ought justly to be made by your petitioner on account of any damages, or on account of the construction, repairing or operating of said railroad or its appurtenances to the said parties owning, claiming or interested in, the said above described premises,

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or in any part or portion thereof. And your petitioner will ever pray, &c."

The facts are sufficiently set forth in the opinion.

C. B. Potter, M. J. Smiley and H. F. Severens, for the appellant.

D. A. Winslow and G. V. N. Lothrop, for the railroad company.

CAMPBELL, CH. J.—The proceedings appealed from were taken under the general railroad law, to condemn certain lands for a right of way. The appellant demanded a jury, and the verdict was rendered and signed by eight out of twelve. The first question presented refers to this verdict.

The clause in the constitution, under which this jury was demanded, declares that, except when to be made by the State, the compensation to be made when property is taken, "*shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law.*" Constitution, Art. XVIII. § 2.

The section of the law referring to the power of commissioners seems to contemplate that a majority of them may determine the compensation. It also declares that the jury shall proceed to determine the necessity of taking, and the compensation, "in the same manner, and with like effect, as is provided in this section in the case of commissioners, *but they shall all be present and act together during the proceedings, &c.*" Comp. L. § 1965. It is claimed that if the jury are all present and acting, the analogy to the functions of commissioners renders a majority verdict valid.

If the term "jury," as used in the constitution, authorizes anything less than a unanimous verdict, it

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means what it does not signify in any other part of the constitution, or in any of our old statutes to which our attention has been turned. It is not claimed that in the absence of such a clause the provisions concerning "trial by jury" would prevent the State from having damages for lands taken for purposes of necessity assessed by other means. But, when a "jury" is provided, it is insisted by the appellant that it must be a jury in the common-law sense, deciding only by a unanimous verdict.

In examining our old statutes, it will be found that in the early railroad acts, and in the Central and Southern railroad charters, as well as in several others founded on them, the jury of inquest was allowed to consist of a less number than twelve. And it is claimed that the term "jury" was thereby made to embrace a body of men different from a common-law jury, and more in the nature of appraisers,—subject to different rules and authorized to act by majorities. And we are referred to *Cruger v. Hudson River R. R. Co.*, 12 *N. Y.* 190, where the corresponding clause in the New York constitution was construed to make them no more than a board of appraisers. The court base their decision on former practice and on statutes which allowed such bodies called "juries" to act in that way; and held that no new rule was intended.

We are not satisfied with the reasoning of that case (which is in conflict with *Lamb v. Lane*, 4 *Ohio St.* 167, where the subject was carefully discussed); but we do not deem it applicable here, as we never had any recognized practice of the sort. As the constitution does not limit the number of commissioners except by a minimum, so that there may be twelve or any other number larger than three, it is difficult to understand why any thing was said about a jury at all, if its proceedings and powers were to be entirely subject to legislative regulation. If a jury does not mean a body

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acting substantially like a common-law jury, it means nothing at all; and the provision is senseless.

Juries of inquest were as well known to the common law as juries for the trial of causes. But, unlike petit juries, they might formerly, in many cases, consist of more or less than twelve. But there seems to be no authority in modern times, and it is very doubtful whether there ever was any, favoring the idea that a verdict of twelve or less would be valid that was not unanimous. Our railroad charters, previous to the present constitution, generally, if not universally, have from the beginning denominated the jurors selected to fix the damages a "jury of inquest." They were neither called nor treated as mere appraisers; and while there are no decisions in this State on the question whether unanimity was required in their findings, it is probably for the same reason that there are in modern times none concerning the unanimity of petit jurors,—the necessity being taken for granted. It is to be remarked that our present constitution is more specific than that of New York, and requires a jury of *twelve* freeholders, thus introducing a more stringent rule than that which had obtained here before, and leaving the legislature no discretion as to numbers or quality. We think the constitution will not permit the jury so specifically provided for, to be changed into a mere board of appraisers, or to be treated as anything but a jury of inquest. The statute must be so construed (as it may fairly be) as to render it valid in this regard. We are not called upon to decide whether the constitution can be satisfied without a concurrence of all of the three commissioners, where such are appointed, as the provisions concerning a jury do no strike us as open to any doubt. The verdict is a nullity.

But it becomes necessary to inquire further in order to determine whether the case can be properly sent back for a new jury.

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The petition was objected to as insufficient, because, instead of declaring it to be the intention of the company in good faith to construct and finish a railroad "*from and to the places named for that purpose in its articles of association,*" it avers such an intention only between certain points which are named, including thereby "Division number two," of the projected road. The section under which the petition was filed, expressly requires the former averment. But by an amendatory statute of 1867, companies were under certain circumstances authorized "to designate a division of not less than fifteen consecutive miles" for construction, with "full power and authority to *construct, operate and maintain a railroad*" upon "the division thus designated." *Sess. L. 1867, p. 107-8.* We think that when a company has complied with the statute, and designated such a division under circumstances authorizing it, an intention confined in terms to that part of the road would be sufficient, and the provisions of the section prescribing the contents of the petition may be modified according to the amendatory act, inasmuch as under the latter no forfeiture arises from a failure to build other parts of the road. *Sess. L. 1867, p. 108, proviso.* But the petition must show the one thing or the other; and if it does not contain a compliance with the original section, it should aver such facts as to bring it within the amendment. It does not appear that there was any authority for setting apart division number two, nor that it is a division of not less than fifteen consecutive miles,—all of which should be made to appear in some way.

It is also objected that the lands proposed to be taken are not specifically described, as they should be, but are set forth as two continuous parcels,—not showing in what portions the various persons described as the owners are interested. This objection may be considered with another that grew out of it, that the dam-

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ages are not apportioned, but the value of the entire lands taken is given in one sum of two thousand dollars.

Section 19 of the railroad law (*Comp. L.* § 1963),—which directs what shall be set forth in the petition,—contains no very positive requirement as to how the property shall be described; but there are some inferential reasons which would seem to make it necessary to go somewhat more into detail than is done here. The description in this petition contains little more than a general description of the central line of the road and of the location of the way by reference to it,—giving no information as to how it may affect smaller parcels,—while it distinctly appears that streets are crossed, and a village is entered. The section not only requires a “description of all the real estate, property or franchises, or so much thereof as the company seeks to acquire,” but the purposes for which it is needed, and the reasons why the company has been unable to acquire title. The parties interested are to be described, and it is made lawful, though not necessary, perhaps, to state what incumbrances exist on the property or any of it.

The fact of inability to obtain title amicably is made a jurisdiction fact by section 18 (*Comp. L.* § 1962). and might be controverted. *Dyckman v. Mayor, &c.*, 5 *N. Y.* 434, and cases cited in *Abb. Dig. Corp.* 186-7; *Leslie v. St. Louis*, 47 *Mo. (Law Reg.* Sept. 1871, p. 602). It is manifest that these reasons might not be the same in regard to various persons or parcels. But a principal difficulty arises out of the necessity of dealing with each owner's rights separately. Any person who is interested may demand a jury, and when one is demanded the inquiry does not extend to the case of those who have not demanded it. The language of the statute is that the jury shall “ascertain and determine the necessity for taking lands,

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franchises or other property, and to appraise and determine the damages or compensation to be allowed therefor to the owners or persons interested in each *particular description of real estate mentioned in said petition, who have demanded such jury,*" &c. As to all others, the jury is "deemed to have been waived." Sec. 20. Section 24 (*Comp. L.* § 1968), contains a provision for determining disputes where there are adverse claimants for money awarded as compensation.

No one can fail to observe that a verdict giving a round sum as damages for a continuous strip of land crossing several parcels, does not accomplish any thing whatever concerning the rights of the several owners. The land may be different in quality and value,—parts may be improved and parts unimproved,—small lots may be ruined, and larger ones may be damaged but a trifle. Unless each separate holding is viewed by itself, the owner's rights cannot be protected at all. It is not supposable that any legislation can have been intended to disregard private rights so recklessly. No man can be compelled to have his property exposed to such dealing. When the property taken is not for the State, every one is entitled to have some impartial tribunal pass, both upon the necessity of the taking, and the proper compensation to be made for it. He is interested in none but his own, and has a right to have his own rights passed upon and protected. He cannot be compelled to yield up a right of way until it has been declared by competent and impartial authority necessary, nor if necessary, until his compensation has been fixed. This can only be done separately, or, at all events, by separate parcels. *Rex v. Cooke, Cowp.* 16; *Rex v. Manning, 1 Burr.* 377. It would be quite as sensible to allow one jury to try half a dozen actions of assumpsit and give one lumping verdict for them all, as to combine in one sum the damages of distinct

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land owners. As the statute contemplates that when one person claims a jury no inquiry shall be made beyond his case, the inference is inevitable that the petition should show in what lands he is supposed to be intereered. But the same necessity would arise in case of any number of claimants demanding that right. The jury or appraisers, as the case may be, are expected to deal with the rights of all severally and not jointly, when they have no joint interest.

It is evidently expected, under the statute, that when any person demands a jury, they will be able from the petition itself to understand what property is to be the subject of their investigation, and what necessity is claimed to exist for taking it. The necessity is not the same in all cases. If the road itself is found necessary, it may not be found necessary to lay it over the premises in dispute; and the necessity of the road may not involve the necessity of taking all that is sought for buildings and depot grounds. It is quite plain that a verdict which might be one way if the property must all be considered and appraised together, might be varied in regard to particular parcels, both as to damages and necessity of use. Under most of our old statutes before the present constitution, each lot had to be made the subject of a separate application and proceeding. The present statutes have made one proceeding sufficient in each county, but they have not undertaken, and could not lawfully undertake, to confound several interests, so as to compel one man's rights to be so mixed up with another's that the jury could not award each his proper dues.

The petition before us has undertaken to follow the language of the statute so literally as to prevent the several interests from appearing with any degree of certainty. And the result is that the verdict, following

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the same ambiguous course has made no finding at all on the rights of the party appealing.

The whole proceedings, so far as they concern the appellant, must be quashed, and if the company desire to obtain a condemnation of his land they must commence new ones. He is entitled to costs of all the proceedings.

The other justices concurred.

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RAILROAD COMPANY.

47 *New York*, 157.

Judgment creditor. A judgment creditor is not an *owner* within the purview of the statutes allowing condemnation of lands for public purposes upon compensation awarded. He has simply a lien for collection of his debt subject, at any time before rights become vested by sale, to be cut off by act of the same power, the legislature, which created his right to the lien.

Eminent domain. In the exercise of the right of eminent domain there can be no doubt of the validity of a legislative provision causing the lien of a judgment not ripened into title by a sale, to be superseded by proceeding for condemnation of lands for railway purposes, on payment of compensation to the owner.

Appeal from judgment of the general term of the superior court of Buffalo.

Action in ejectment to recover possession of a strip of land occupied by the defendant in the city of Buffalo.

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Elijah A. Bigelow is recognized as the common source of title, to the land in question, November 18, 1841. Judgment against Bigelow was recovered by Israel T. Hatch. On August 10, 1844, the premises were sold by the sheriff under execution issued in this judgment, to Rufus Watson, to whom, on January 23, 1846, sheriff's deed was duly executed and delivered. On the 31st of the same month, Rufus Watson conveyed the premises to the plaintiff.

The defendant claims, through the following chain of title, to have paramount right to possession :

The plaintiff and William K. Watson recovered a judgment against Elijah A. Bigelow on May 3, 1841. Execution issued and was returned *nulla bona* prior to September 1, of the same year. On September 22, 1841, the plaintiffs in the judgment filed a creditor's bill in the chancery court against Elijah A. Bigelow alone as defendant ; and in pursuance of an order entered in the suit Bigelow assigned all his property to William K. Watson as receiver. August 22, 1842, Bigelow filed his petition in bankruptcy in the United States district court, was in due time adjudicated a bankrupt, and Benoni Thompson appointed his assignee.

On November 16, 1843, the Attica and Buffalo Railroad Company commenced proceedings under its charter by petition to the vice-chancellor, to take the premises and other lands for the uses of its road. William Watson, and Thompson as receiver and assignee, were made parties to the proceedings, but neither Bigelow, the complainant in the creditor's bill, nor Hatch were named in them or notified of their pendency.

The final order was made February 23, 1844, and the Attica and Buffalo Railroad Company that day entered into possession.

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The defendant company succeed to their rights in the premises.

Judgment below in favor of the defendant.

J. Ganson, for appellant.—Judgment liens are defects of title, and so recognized by the legislature and the courts in these proceedings. *Matter of N. Y. Central R. R. Co.*, 20 *Barb.* 419; *Dows v. Congdon*, 16 *How. Pr.* 571; *Laws of 1847*, ch. 272, § 3. The term "owner," in these statutes, includes all having any legal or equitable private rights in the property taken. *Ellis v. Welch*, 6 *Mass.* 246, 251; *Parks v. Boston*, 15 *Pick.* 198, 203; *M. C. & B. Co. v. Townsend*, 24 *Barb.* 658; *Exp. Jennings*, 6 *Cow.* 518, 525, 526; *Baltimore & Ohio Railroad v. Thompson*, 10 *Md.* 76; *Turnpike Road v. Brosi*, 22 *Penn.* 29; *Brown v. Powell*, 25 *Id.* 229; *Enfield Toll Bridge Co. v. Hartford, &c. R. R. Co.*, 17 *Conn.* 454. The commissioners were not authorized to appraise damages or award compensation to any one save the owner. *Hill v. Mohawk & Hudson R. R. Co.*, 3 *Seld.* 152; *Regina v. Metropolitan Comm. of Sewers*, 18 *Eng. Law & Eq.* 213; *Jones v. Reed*, 1 *Johns. Cas.* 20; 4 *Black. Com.* 268; *Rex v. Whitear*, 3 *Burr.* 1366; *Linder v. Plass*, 28 *N. Y.* 465. The award of the commissioners was an adjudication, and final. *S. V. R. Co. v. Moffatt*, 1 *Cal.* 577; *Visscher v. The Hudson River R. R. Co.*, 15 *Barb.* 37; *Matter of Mount Morris Square*, 2 *Hill*, 14. A statute conferring a right not vested by common law will not be so construed as to go beyond its letter. *Dewey v. Goodenough*, 53 *Barb.* 54.

A. P. Laning, for respondent.—By the filing of the creditor's bill, plaintiffs therein acquired an equitable lien, and any lien or transfer thereafter was subject to it. *Corning v. White*, 2 *Paige*, 567; *Storm v. Waddell*; *De Kay v. Waddell*, 2 *Sandf. Ch.*

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494. The conveyance to receiver vested him with title as of time of filing bill. *Chautauqua County Bank v. White*, 6 *N. Y.* (2 *Seld.*) 236; *Storm v. Waddell*, 2 *Sandf. Ch.* 494; *Brown v. Nichols*, 3 *Hand*, 26, 30, 43. It is no objection that the order and assignment were in general terms, "all the real estate." *Roseboone v. Mesher*, 2 *Denio*, 61, 67; *Bayard v. Hoffman*, 4 *Johns. Ch.* 450; *Chaut. Co. Bank v. White*, *supra*. The lien of a judgment is statutory, and can be abrogated by statute. *Morse v. Gould*, 11 *N. Y.* 281.

RAPALLO, J.—It is found by the court below that the defendant has succeeded to the rights of the Buffalo and Attica Railroad Company in the land in dispute. If by the order of the vice-chancellor, made in February, 1844, the Buffalo and Attica Railroad Company acquired the right to the possession and use of the land during the continuance of its charter, for the purposes of its incorporation, the plaintiff could not maintain ejectment, and the defendant was entitled to judgment. The plaintiff claims that by the order of the vice-chancellor, the company obtained no rights which could be set up as against him, for the reason that his title was derived under a subsequent sheriff's sale on execution upon a judgment, which was a lien upon the land at the time of the institution of the proceedings by the railroad company before the vice-chancellor, and that the judgment creditor in whose favor such lien then existed was not a party to the proceedings.

The court below held that the act under which the proceedings for condemnation of the land were instituted, did not require that judgment creditors be made parties thereto. *Laws of 1834*, p. 228; 1836, p. 323; 1843, p. 226. That under those acts the proceedings were to be taken only against the *owners* of the land, and that compensation was to be made only to such *owners*. That a judgment creditor having a mere

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statutory lien was in no sense an owner, and that the title of the railroad company, when acquired under the acts, became paramount to such lien.

The provisions of the acts in question are fully referred to in the opinion delivered at general term by MASTEN, J., and we concur with the learned judge that they admit of no other construction than that the *owners* were the only necessary or proper parties to the proceeding.

The general railroad laws of 1848 and 1850 provide for making parties all persons interested, as *owner*, *tenant*, *lessee*, or *incumbrancer*. But no such provision was contained in the act of 1836, ch. 242, under which the Buffalo and Attica Railroad Company derived its powers, or in the act of 1834, ch. 177, referred to in the act of 1843, ch. 169. In those acts the only parties for whom notice or compensation are provided are the *owners*.

The terms "owner or owners," as used in these statutes, being intended to designate the parties entitled to the compensation which is substituted for the land taken, should be held to embrace all persons having estates in the land, in possession, reversion, or remainder. *Parks v. City of Boston*, 15 *Pick.* 198. All persons having proprietary interests are entitled to compensation, for the aggregate of those interests constitute the ownership or fee. It has been frequently held that tenants for years are owners within the meaning of similar statutes. *Turnpike Road v. Brosi*, 22 *Penn. State*, 29; *Brown v. Powell*, 25 *Id.* 229; *B. & O. R. R. v. Thompson*, 10 *Md.* 76; *Parks v. City of Boston*, 15 *Pick.* 198. Also that a franchise issuing out of the land may be regarded as real estate, for which the owner is entitled to compensation. *Enfield Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 *Conn.* 454.

But a judgment creditor of an owner has no estate or proprietary interest in the land. He stands wholly

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upon the law, which gives him a remedy for the collection of his debt by a sale of the land under execution, in case sufficient personal property of the debtor should not be found. This remedy is not secured by contract, but is purely statutory, and in aid of it acts have been passed, from time to time, authorizing a sale of the land which the debtor owned at the time of the recovery or docketing of the judgment, or at any subsequent period, and making the judgment a lien upon the land. The duration of this lien and the mode of its enforcement and discharge are subjects which appertain to the laws for the collection of debts; and the rules upon those subjects have been changed, from time to time, according to the will of the legislature. The power of the legislature to regulate those matters can not be doubted. Acts have been passed shortening and lengthening the duration of the liens of existing judgments, and even providing for their extinguishment without any proceeding to which the judgment creditor was a party. By the act of April 2, 1813 (1 *R. L.* 500), it was provided that no judgment theretofore rendered should be a lien for more than ten years from April 9, 1811. By the act of April 3, 1821, the lien of judgments recovered between April 9, 1811, and April 2, 1813, was extended to ten years from the time of docketing; and the lien of judgments on which executions had been issued was further extended three months. By the act of May 14, 1840, the duration of the lien of all then existing judgments was reduced to five years from the time that act took effect. Laws of 1840, ch. 386, § 32. By the act in relation to the foreclosure of mortgages (*Laws of 1840*, ch. 342, § 9), it was provided that judgment creditors need not be made parties to foreclosure suits, and that the lien of their judgments should be cut off by the foreclosure though they were not parties. This act applied to existing as well as future judgments. By section 282

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of the Code, the real estate of the debtor may be exempted from the lien of the judgment by being marked secured on appeal, and this provision, when originally adopted, applied to then existing judgments.

It is clearly within the power of the legislature to abolish the lien of all judgments at any time before rights have become vested or estates acquired under them, and, placing real estate on the same footing as personal property, to confine the remedies of the creditor to the property held by the debtor at the time of issuing the execution.

This would be no greater exercise of power than the abolition of the right of distress for rent, or of the lien of the landlord on property taken in execution, or of the right of imprisoning the debtor. Yet the validity of such laws has been fully recognized even where they affected existing claims or judgments. They do not take away property, or affect the obligation of contracts, but simply affect legal remedies. There can, therefore, be no doubt of the validity of a provision causing the lien of a judgment, not ripened into a title by a sale, to be superseded by the taking of the land under proceedings in exercise of the right of eminent domain, on payment of compensation to the owner of the land.

We think that the act of 1836 had that effect. It is claimed on the part of the appellant that if the judgment creditor is not an owner, the act makes no provision for divesting his interest; and therefore the effect of the order of condemnation is to vest in the company the right to the land, subject to the lien of the judgment, in the same manner as if the company had taken by deed from the owners. But such a construction cannot be admitted.

The object of the act was to delegate to the company the right of eminent domain, to the extent necessary to enable it effectually to secure its roadway, &c., in case

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it should fail to obtain it by contract with the owners. It provides for the appraisement, on notice to the owner or owners, of the value of the land taken, and of any further damages which the owners may sustain by the construction of the road, injury to buildings, &c. The whole amount of this appraisement is directed to be paid to the owners. There is no provision for assessing the value of the interest of the owners, subject to the lien of judgments, or for retaining any part of the value of the land as indemnity against such judgments. The whole value must be paid to the owners, or deposited in bank, and the owners are left to pay their own debts.

The act then states what right the company shall obtain by virtue of such payment to the owners, and the order made thereupon. On the completion of the proceedings, the company is declared to be possessed of the land during its corporate existence, with the right to use the same for the purposes of the road.

This declaration excludes the implication, that, after the owners have been compensated, the right of any other person to interfere with the possession or use of the land is reserved, or that, in order to retain such use, the company is bound to satisfy liens of judgment creditors, after having been compelled to pay the whole value of the land to the owner.

What recourse the judgment creditor might obtain in equity upon the proceeds paid to, or deposited to the credit of the owner, is a question not involved in this controversy, neither is it necessary to consider how the rights of mortgagees would be affected by the proceeding, or what protection they could obtain.

The matter of the lien of judgments being wholly under the control of the legislature, they had power to confer upon the company the right of possession and use of the land free from all such liens, on paying the value of the land to the owner; and we think it was

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manifestly their intention so to do, modifying to that extent the laws giving liens to judgment creditors.

In the present case, this modification had been made before the judgment relied upon was recovered ; but it is not necessary to rest our conclusion upon that ground.

The act of 1847 (ch. 272, § 3) is referred to by the counsel for the appellant, as implying that an outstanding judgment affecting the interest of an owner who had been compensated, was recognized by the legislature as a defect in the title. But no such inference can properly be drawn from the act of 1847. Its provisions afforded a remedy to the railroad company in cases where land, obtained by conveyance from an owner, was subject to liens under which title had subsequently been perfected, and the title of the company was thus rendered invalid, and also in cases where, in proceedings for condemnation, some owner had been omitted.

The objection taken in the points, that the case does not show that the final order was recorded, was not taken at the trial. If taken, it might have been in the power of the defendant to furnish the proof. The case does not show that the order was not recorded, and we have frequently held that we will not reverse a judgment on the ground of a mere omission of a finding or of proof of a fact, susceptible of proof, unless the point was taken at the trial.

The only other objection raised to the validity of the proceedings is, that the orders subsequent to the appointment of the appraisers should have been made by the county judge, and not by the vice-chancellor.

The act of 1836 directed that the application should be made to the county judge for the appointment of a jury of appraisers, and that on the filing of their inquiry, and proof of the payment of the amount, he should make a final order reciting the proceedings, which order should be recorded. It gave no power to

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the county judge to modify the appraisement. The act of 1843 provides that the act of 1836 be so altered that instead of a jury, three appraisers shall be appointed by the vice-chancellor, according to the provisions of the act of 1834, chapter 177, section 16, and that the damages may be increased or diminished by the vice-chancellor, as provided in that act. The act of 1843 is silent as to who shall make the final order. But it contains no provision indicating that a part of the proceedings shall be conducted before one officer and part before the other. It is very imperfect in its frame and language, and leaves much for construction. But it clearly required the first application to be made to the vice-chancellor, and required the submission to him of the proceedings of the appraisers, that he might confirm or modify their award as to damages; and we think it did not contemplate a subsequent proceeding before the county judge, or that an order should be made by him reciting proceedings not had before him, but before the vice-chancellor. Reading the three acts together, we think it was the intention of the act of 1843 to substitute the vice-chancellor for the county judge throughout the proceeding.

Having come to the conclusion that, conceding the Hatch judgment to have been a lien at the time of the condemnation, it was cut off or superseded by the proceedings, and that no irregularity or invalidity in the proceedings is shown, a discussion of the question of adverse possession is not necessary, and the judgment must be affirmed, with costs. .

CHURCH, Ch. J., ALLEN and GROVER, JJ., concur;
FOLGER, J., dissents; PECKHAM, J., of kin to plaintiff,
not voting.

Judgment affirmed.

Reed v. Hanover Branch R. R. Co.

REED v. HANOVER BRANCH RAILROAD
COMPANY.

(105 *Massachusetts*, 803.)

Jury. In *Massachusetts*, under Gen. Stat. ch. 48, § 28, providing for summoning a jury to assess damages for private lands taken for public purposes, the "three nearest towns" refers to the proximity of these towns to the town in which the land lies, without regard to the location of the land within the town.

Partners.—Damages for condemnation of lands. Partners may recover damages jointly for lands taken for public purposes which were held by one partner in trust for the firm.

Railroad.—Damages for lands taken. A party whose lands are taken by a railroad corporation is entitled to the damages assessed as of the time the lands were taken, with interest to time of assessment.

Petition to the county commissioners for the assessment by a jury of damages occasioned to the firm of A. S. Reed & Co., composed of Amos S. Reed and Amos N. Reed, by the taking of their real estate in Abington for the construction of the respondents' railroad.

At the hearing by the jury, in Abington, October 26, 1869, the presiding officer overruled objections made by the respondents to the proceedings; and certified his rulings to the superior court, together with the verdict, which was for the petitioners in the sum of nine hundred dollars with the interest from June 1, 1866, the date when the real estate was taken. The superior court accepted the verdict, and ordered judgment thereon; and the respondents appealed. The case is stated in the opinion.

J. B. Harris, for the petitioners

P. Simmons, for the respondents.

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CHAPMAN, Ch. J.—1. The respondents having located their railroad over lands claimed by the petitioners, they filed an application under the Gen. Stat. ch. 63, § 22, for damages to be assessed by a jury. Under such an application, the proceedings are to be the same as are provided for the recovery of damages in the laying out of highways. The provision in respect to highways is contained in chapter 43. By section 27 the warrant for a jury is to be directed to the sheriff or his deputy, or a coroner if the sheriff is interested; and by section 28 he is “to require of the selectmen of the three nearest towns not interested in the question, if there be so many in the county,” to return the required number of jurors.

The respondents contend that in this case the provisions of the statute have not been complied with, because the jurors were not drawn from the three towns situated nearest to the land taken, none of them having been drawn in Hanover, which is nearer by more than one mile to the land taken than the town of East Bridgewater. The land taken was in Abington, and the jurors were taken from North Bridgewater, East Bridgewater, and Hingham, which are certified in the return of the sheriff to be the “three nearest towns in the county not interested in the question.”

We think the word “nearest” in the statute refers to the situation of the towns relatively to each other, and not relatively to the tract of land to be viewed. The position of the towns is a fact known to all officers, because it is established by public law; but the distance of the land from the line of each adjoining town is not thus known, and could not be ascertained without considerable labor and expense. If there were different tracts to be viewed, the difficulty would be greatly increased, and more than one jury might be required, especially if different parties were applicants. We can see no good reason why the legislature should

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have regarded anything but the relative position of the towns. The manifest purpose of the provision is to exclude jurors living in the town where the land lies, and at the same time to save unnecessary travel. These objects are secured by taking the jurors from the towns nearest to the town in which the land lies, and we think this is all that the language of the statute requires. *Wyman v. Lexington & West Cambridge R. R. Co.*, 13 *Metc.* 316.

2. The petitioners are copartners, and a part of the land was conveyed to one of them, who holds the legal title ; but it was paid for by partnership funds, is used for partnership purposes, and he admits that he holds it in trust for the firm. The respondents object that both plaintiffs cannot recover damages for the taking of this land. But we cannot see how this matter is material to the respondents. They pay no more to both petitioners than they would have paid to A. N. Reed as sole claimant, and the fact that he permits his *cestui que trust* to join with him in the petition merely brings the equitable as well as the legal title into the case, and settles all claims, equitable as well as legal, against the company in respect to this land. And as A. S. Reed was in the actual occupation of his undivided half of the land, by his tenant, Edward P. Reed, not paying rent, but receiving rent, as having the equitable title thereto, it was proper that he should be a party to the petition in respect to it, and receive his share of the damages directly. *Ashby v. Eastern R. R. Co.*, 5 *Metc.* 368.

3. The damages were to be assessed as of the time when the land was taken, because the title was then transferred to the respondents ; and as they were due immediately, interest was properly allowed on the amount.

Judgment affirmed.

Hegar v. Chicago, &c. R. R. Co.

HEGAR v. THE CHICAGO AND NORTH-
WESTERN RAILWAY COMPANY.

26 Wisconsin, 624.

Public street. The owner of a lot bounded by a public street, in a recorded town or village plat, takes to the center of the street, subject to the public easement.

Railroad. When a railroad so occupied a street with its road-bed and ditches as to destroy the usefulness of that half of it next the lot owner, as a street,—*Held*, that the railroad must be considered as having taken the whole of the half street, though several feet of it were not actually occupied.

Measure of damages. In such case the plaintiff would be entitled to show the value to him of the whole of the half street, as a street, and to recover therefor.

Practice. Where two issues were presented, one for the court and one for the jury, the verdict of the latter will not be set aside because the court has neglected to decide the issue referred to it, but the judgment on review will be reversed and the case remanded for the trial of the other issue.

Appeal from the Jefferson county circuit court.

Plaintiff avers that he is the owner in fee of a parcel of land in the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 35, T. 7 N., R. 14 E., situate in said county, and also of a parcel of land six rods long, lying along Catharine-street, in the village of Jefferson, of the uniform width of two rods measuring east from the center of said street; and alleges that the defendant unlawfully withholds the possession of said land.

The defense is a general denial, and as to the first mentioned parcel, an agreement between Mr. Holmes, grantor to plaintiff, by which Holmes agreed to convey said land to the defendant.

The court is asked to direct plaintiff to convey ac-

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cording to contract of Holmes. Replication denies the alleged agreement between Holmes and the company.

A jury was impaneled to try the second cause of action stated above.

The plaintiff proved that he was the owner of lot seven and of the north half of lot six, in block seven, Howell's addition to the village of Jefferson, that by the recorded plat of said addition said lots fronted on Catharine-street, and that said street was four rods wide. The strip in question was the east half of this street.

A witness, Spright, was asked for the plaintiff,—“What is the yearly value of the two rods by six?” (objected to, and objection overruled)—and answered, “About fifty dollars.”

The jury were instructed in substance as follows:—The plaintiff is owner in fee of the half of the street adjoining his lot, and if that portion of the street is so used by the defendant as to destroy its usefulness as a common highway, the jury will be justified in finding the defendant to be in possession of the whole of that half of the street. If the jury do not find it to be in possession of the whole, then they should describe the portion of which it is in possession.

The court refused an instruction offered by the defendant, to the effect that the plaintiff could not recover for any more of the strip than was actually occupied by the track and the ditch on the east side of it.

The jury found that the land described as the east half of Catharine-street belonged to plaintiff in fee; that he was legally entitled to the possession of it; and that the defendant unlawfully withheld possession to his damage of one hundred dollars.

Judgment was rendered in accordance with the verdict; but the issue as to land just described was not determined.

Defendants appealed.

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Enos & Hall, for the appellants.—I. The title to the east half of Catharine-street is in the village of Jefferson, not in the plaintiff. *R. S.* ch. 47, § 5; *Kimball v. City of Kenosha*, 4 *Wis.* 153; *Weisbrod v. Railway Co.*, 21 *Wis.* 602; all in harmony with statutory provisions.

II. The plaintiff should not have recovered for more land than was actually in possession of defendant.

III. It is improperly assumed in question to Witness Spright that plaintiff was entitled to recover for occupation of the street, without regard to the public easement therein.

IV. It was error to render final judgment without disposing of both issues. 9 *Wis.* 246; *R. S.* ch. 132, § 6; 17 *Wis.* 351.

Weymouth & Porter, for respondents.—I. Proprietors of lots bounded by a public street take to the center of the street, and own the land subject to the public easement. *Kimball v. City of Kenosha*, 4 *Wis.* 321; *Goodall v. Milwaukee*, 5 *Id.* 32; *Milwaukee v. R. R. Co.*, 7 *Id.* 85; *Mariner v. Schulte*, 15 *Id.* 692; *Ford v. R. W. Co.*, 14 *Id.* 609; *Weisbrod v. R. W. Co.*, 18 *Id.* 35.

II. The question to Spright and the instruction respecting the extent of the recovery were proper. *Ford v. Railway*, 14 *Wis.* 609.

COLE, J.—There were two issues in this case. In respect to the piece of land first described in the complaint, the defendant set up an agreement between it and Mr. Holmes, the plaintiff's grantor, by which Holmes promised and agreed to convey that strip of land to the defendant company; and it asked for a specific performance of this agreement. This of course was in the nature of an equitable counter-claim, to be tried by the court.

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We suppose it was irregular practice to enter judgment upon the verdict without also disposing of the other issue. There may be no necessity for submitting any question on the equitable counter-claim to a jury ; and therefore, whether the verdict should be set aside and a new trial ordered, depends entirely upon the result of the trial on the issue not disposed of. For we are satisfied that no error has intervened which would warrant the court in setting aside the verdict upon the issue already tried. Exceptions have been taken to the rulings of the court on the trial ; but we think they are all untenable. In the first place it is objected, that the court erred in permitting the witness Spright to answer the question asked him as to the yearly value of the strip of land in the village of Jefferson ; because, it is said, the question and answer assume that the plaintiff is entitled to recover that value without regard to the public easement thereon. But we do not so understand the matter. The claim was, that the defendant company unlawfully occupied the east half of Catharine-street abutting on the plaintiff's lots, with its road-bed, ditches, &c., and that consequently the street was useless on account of these obstructions. And the question was, what was the annual value of this strip—which had thus been unlawfully occupied—as a street, and as a means of ingress and egress to and from the adjacent lots ? The use and enjoyment of this strip for the purposes of an ordinary street or highway, might be valuable to the owner of the adjoining lot ; and whatever this value was might be recovered in the action. And the object of the question was to prove this value, subject, of course, to the right of the public to use the street for the purposes of an ordinary highway.

The plaintiff proved that the defendant had constructed its road in Catharine-street in front of his lots, and that its road-bed, and the ditch on the east side of

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the track, occupied all of the strip of land described in the complaint lying east of the center of Catharine-street, except six or eight feet on the east side, not sufficient for a road, which few feet in width the company had never occupied. The defendant asked the court to instruct the jury that the plaintiff could not recover any more of the strip of land in Catharine-street than the defendant actually occupied by its track and the ditch. The court, however, refused so to charge, but did instruct the jury, in substance, that if the company so used and obstructed that portion of the street as to destroy it as a common highway, that fact was sufficient to warrant them in finding that the defendant was in possession of the whole of that part of the street. We can see no objection to this charge. For while the company did not actually cover with its road-bed and ditch the entire space from the center of the street to its eastern limit, yet it practically destroyed that entire space for a street. It was really in possession of that strip of ground.

The doctrine that the proprietors of lots bounded by a public street within a recorded town plat or village, take to the center of the street, and own the fee subject to the public easement, is so well established in this State that it is no longer open for argument. For the reasons given in the first part of this opinion, the judgment must be reversed, and the cause remanded with directions to proceed and try the issue for equitable relief.

By THE COURT.—Judgment reversed and cause remanded with the directions above specified.

City of Hannibal v. Hannibal & St. Joseph R. R. Co.

THE CITY OF HANNIBAL v. HANNIBAL & ST.
JOSEPH RAILROAD COMPANY.

49 Missouri, 480.

Cities,--Hannibal.--Establishment of streets.--Charter. The power to open streets, as given in the charter of the city of Hannibal, includes the power to establish streets.

Hannibal, charter of.--Proceedings for condemnation of streets.--Petition of property-holders. No petition by the property-holders is required by the charter of the city of Hannibal, in order to authorize proceedings for the establishment of streets in that city.

Eminent domain.--Country roads crossing railroads.--General grant. Power to appropriate the property of a railroad in such a manner as to destroy or greatly injure its franchise, or render it impossible or very difficult to prosecute the object of its organization, cannot be inferred from the general grant of power to establish a road across its track, but such general grant is sufficient to warrant the laying of a road across its track whenever public necessity demands it; and as to whether that public necessity exists, the city council must be the judge.

Streets, establishment of.--Hannibal city council.--Jurisdiction over. In proceedings for establishment of streets in the city of Hannibal, the city council of that city alone has jurisdiction.

Error to Hannibal court of common pleas.

A. B. Wilson, for plaintiff in error.

James Carr, for defendant in error.

BY THE COURT.—BLISS, J.—The city of Hannibal established a street across the track of defendant's road, and on appeal to the common pleas the proceedings were dismissed. Defendant claims that the city had no right to establish the street :

1. Because no power to establish any new street is

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given in the charter; the power being to open new streets, which counsel would limit to opening streets contained in the plan of the city and of its additions. The power to open a street appears to be used in the city charter as synonymous with the power to lay out and establish such street. I infer this, because otherwise this important power would be withheld entirely from the city, but more especially because the whole statute shows that it was so understood. Section 15 of the act of March 20, 1861, amending the charter (*Sess. Acts 1860-1*, p. 247), provides for taking and paying for private property for opening, &c., any public street. If it had already been established, there would be no private property to be taken. The same remark applies to article IX. of the act of 1851, incorporating the city. *Sess. Acts 1851*, p. 336. Our road laws use the term in the same general sense, as will be seen by reference to sections 1, 51, and 52 of the act of 1868 (*Wagn. Stat.* 1217, 1228), although sometimes it is used in its more restricted sense.

2. Defendant secondly excepts to the proceedings because there was no petition by the property-holders. No such petition is required in the proceeding under consideration. The findings under section 2 of chapter 9 of the act of 1851 (*Sess. Acts 1851*, p. 336) are entirely different from the present, and no private property is taken, except by consent or petition of all the holders of property on the street, and in such case without compensation.

3. But the chief point relied upon is predicated upon the fact that the land appropriated had already been taken for public use by the railroad company, and it is claimed that the city corporation has no right to appropriate for another public use any portion of the land so taken—as by laying out and opening a street across the track of the railroad—without paramount necessity and express legislative authority. It was not

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claimed that the city cannot be clothed with power to establish streets across the track, but that no such power will be inferred from a general grant.

I do not suppose that a power to appropriate the property of the railroad in such a manner as to destroy or greatly injure its franchise, or render it impossible or very difficult to prosecute the object of the organization, could be so inferred. Thus, in *Springfield v. C. River R. R. Co.*, 4 *Metc.* 63, cited by counsel, the defendant was authorized to construct its road to a certain point; but the court held that, while the railroad might be made to cross a public highway, as that would be "obviously necessary, and of course warranted," the railroad company, under a grant to locate their road between certain termini, had no authority to run it along and appropriate a public highway, and for the reason that the two uses are inconsistent.

As to the necessity of opening the street, the city council must be the judge, and the fact that it was opened is the best evidence of their view in the matter. *Young v. City, &c.*, 47 *Mo.* 492. If the order had said in express terms that the opening of the street was a public necessity, it would only have shown the opinion of the council—an opinion we could not review—and no benefit would be derived from requiring such declaration. As to the necessity of a special power to lay a street across the track of a railroad, I do not suppose it has ever been granted, nor do I know that the authority to lay a street or public road across such track has been disputed. It may impose some slight additional burden upon the road, but in entering towns or in running through a settled country the necessity of such streets and roads is well known. The franchise is taken subject to any inconvenience that will arise from it, and the general power given city authorities and county courts to establish and open streets and roads, is a

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sufficient warrant to lay them across the track of railroads whenever called for by such necessity.

Of the propriety of the action of the city council we can know nothing; they alone have jurisdiction in the premises, and their action is affirmed, and the judgment of the court of common pleas is reversed.

The other judges concur.

NORTH MISSOURI RAILROAD COMPANY v.
MAGUIRE.

49 Missouri, 482.

Revenue.—County assessor.—Action of, judicial.—Collector, liability of, for irregular assessment. An assessment of stock of a railroad company in the name of the shareholders, instead of that of the corporation, is irregular. But the action of the assessor in such case is judicial, and where it appears from the tax list that the assessor had jurisdiction over the property,—i. e., that it was liable to taxation in some form or other,—the collector would not be liable to the taxpayer for the amount collected under such assessment, notwithstanding its irregularity. In the case supposed the tax bill certified to the collector is a sufficient warrant, and will justify him in the proceeding. *St. Louis Mutual Life Ins. Co. v. Charles*, 47 Mo. 462, affirmed.

Appeal from St. Charles circuit court.

Orrick & Emmons, for appellant.

R. E. Rombauer, for respondent.

BY THE COURT.—WAGNER, J.—The action was against the collector for seizing the property of the plaintiff to collect a tax bill in his hands. The assessment was irregular, and should have been made in the

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name of the shareholders, instead of the corporation, but the property was liable to taxation. That in such a case the collector is not liable is well established. In the case of *St. Louis Mutual Life Ins. Co. v. Charles*, 47 *Mo.* 462, it was held that the action of the assessor and of the board of appeals, or county court, in the matter of taxation, was judicial; and where it appeared from the tax list that the assessor had jurisdiction over the property,—*i. e.*, that it was liable to be taxed in any form,—though irregularly assessed, the collector would not be liable to the taxpayer for the amount collected. See also *Pacific R. R. Co. v. Dulle*, 48 *Mo.* 282. The decision is decisive of this case. It was no part of the duty of the collector to examine the proceedings of the assessor, and see that he regularly pursued his authority, step by step.

If the property was subject to taxation, and the assessor had jurisdiction, the tax bill certified to the collector was a sufficient warrant, and justified him in the proceeding. The judgment of the circuit court was for the defendant, and it will be affirmed.

Judge BLISS concurs.

Judge ADAMS was not on the bench when the case was argued.

EATON v. BOSTON, CONCORD & MONTREAL R. R.

AIKEN v. THE SAME.

51 *New Hampshire*, 504.

A release of all damages on account of the laying out or construction of a railroad through and over the land of the releasor, does not cover damages occasioned to the remaining land of the releasor by the construction of the railroad over the land of other persons.

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The statutes in force from 1849 to 1851, providing for the assessment of the damages of a land owner whose land was crossed by a railroad, did not authorize the assessors to include the damage which was or might be occasioned to such land owner by the construction of the railroad over the land of other persons.

A railroad corporation, claiming to act under legislative authority, removed a natural barrier situated north of E.'s land, which theretofore had completely protected E.'s meadow from the effects of floods and freshets in a neighboring river. In consequence of this removal, the waters of the river, in times of floods and freshets, sometimes flowed on to E.'s land, carrying sand, gravel, and stones thereon. *Held*, that this was a taking of E.'s property, within the meaning of the constitutional prohibition; and that the legislature could not authorize the infliction of such an injury without making provision for compensation.

A railroad corporation constructed their road across the farm of E. Damages were assessed under the statute, and paid to E. E. released the corporation from damages on account of the laying out of the road over his land. Northerly of E.'s farm there was a ridge of land completely protecting the farm from the effect of floods and freshets in a neighboring river. Through this ridge, the corporation, in constructing their road, made a deep cut, through which the waters of the river in floods and freshets sometimes flowed, carrying, on one occasion, sand, gravel, and stones upon E.'s farm. *Held*, that even if the corporation had constructed their road at said cut with due care and prudence, E. could recover, in an action on the case, such damages as had been caused him in consequence of the corporation's cutting away the ridge north of E.'s farm, and thereby letting the river, in times of freshet, run through this cut and damage E.'s land.

A. owned the farm between E.'s farm and said ridge. The ridge was about twenty feet wide upon the top, and a small part of it in width was included in A.'s farm, the northerly line of his farm being near the southerly edge of the top of the ridge. In all other respects A.'s case was similar to E.'s. *Held*, that even if the corporation had constructed their road at the cut with due care and prudence, A. could recover, in an action on the case, such damages as had been caused him in consequence of the corporation's cutting away the ridge north of A.'s farm, and thereby letting the river, in times of freshet, run through this cut and damage A.'s land.

Actions on the case, against the Boston, Concord & Montreal Railroad,—one brought by Ezra B.

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Eaton, the other by Milo Aiken, to recover damages done during the freshet of October, 1869, to their respective farms in Wentworth, and alleged to have been occasioned by the construction of the defendants' railroad.

The defendants were duly incorporated by legislative authority, and constructed their road across the farms of the plaintiffs during the years 1849, 1850, and 1851,—the road having been previously surveyed and located. Damages were duly appraised and paid.

Eaton, on March 24, 1851, after the construction of the road, gave the defendants a warranty deed of that part of his farm on which the road is located, and on the same day executed the following release :

"I, the subscriber, do hereby acknowledge that I have received of the Boston, Concord & Montreal Railroad the sum of two hundred and seventy-five dollars, in full for the amount of damages assessed to me by the railroad commissioners of the State of New Hampshire, in conjunction with the selectmen of Wentworth, on account of the laying out of the said Boston, Concord & Montreal Railroad through and over my land ; and I do hereby release and discharge the said corporation from said damages."

Aiken, on November 7, 1849, gave the defendants a warranty deed of that part of his farm on which the road is located. Said deed contains the following clause : " And in consideration aforesaid, I hereby release said corporation from all damages, direct or consequential, by reason of the constructing, maintaining, and using their railroad on and over the land hereby conveyed, and through my said land." This release, and that executed by Eaton, were printed, save names, amounts, &c., which were inserted in blanks left for that purpose.

Northerly of the plaintiff's farms, which consist of meadow lands lying on Baker's river, there is a narrow

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ridge of land, some twenty-five feet or more in height, extending from the high lands on the east westerly to said river, completely protecting said meadows from the effect of floods and freshets in said river. Said ridge is about twenty rods wide upon the top, and a small part of it in width is included in the plaintiff Aiken's farm,—the northerly line of his said farm being near the southerly edge of the top of said ridge. The plaintiff Eaton's farm lies south of said Aiken's. Through this ridge the defendants, in constructing their road, made a deep cut, through which the waters of said river in floods and freshets sometimes flowed ; and the damages sued for were occasioned by the waters flowing through said cut, and carrying sand and gravel and stones upon said Aiken's farm, and over and across it to and upon the farm of said Eaton. The plaintiffs claim that the defendants are liable for the damages so occasioned, although they may have constructed their road at said cut with due care and prudence. The defendants say that they are not so liable. The defendants claim that, under the circumstances of this case, the corporation are not liable for any damages accruing to the plaintiff from a proper construction of their road, and that in constructing the same they were only bound to do it in the usual manner, and so as to make the owners of adjoining land reasonably safe, and with ordinary care and prudence, and that they were not bound to preclude the possibility of damage by reason of such construction.

The parties consented that the foregoing questions be determined by the court, and that afterwards either party may have a trial by jury if desired, without prejudice from anything herein contained.

Upon the foregoing facts appearing, and the parties having stated their positions and claims, the court, *pro forma*, ruled that the plaintiffs would be entitled to recover such damages as have been caused them in

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consequence of the defendants' cutting away the ridge north of the plaintiffs' farms, and thereby letting the river in times of freshet run through this cut and damage the plaintiffs' land ; to which ruling the defendants excepted.

Carpenter and Flanders, for the plaintiffs.

H. Bingham, Burrows, and Page, for the defendants.

SMITH, J.—Eaton's case will be considered first.

It is virtually conceded that, if the cut through the ridge had been made by a private land owner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action. It seems to be assumed that the freshets were such as, looking at the history of the stream in this respect, might be "reasonably expected occasionally to occur." The defendants removed the natural barrier which theretofore had completely protected the plaintiff's meadow from the effect of these freshets ; and, for the damages caused to the plaintiff in consequence of such removal, the defendants are confessedly liable, unless their case can be distinguished from that of the private land owner above supposed. Such a distinction is attempted upon two grounds,—first, that the plaintiff has already been compensated for this damage, it being alleged that the defendants have, by negotiation, or by compulsory proceedings, purchased of the plaintiff the right to inflict it ; second, that the defendants are acting under legislative authority, by virtue of which they are entitled to inflict this damage on the plaintiff without any liability to compensate him therefor.

In support of the first ground, the defendants rely upon the plaintiff's release, and upon the appraisal of damages under the statute.

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The release does not support the defendants' claim. The plaintiff released the defendants from damages on account of the laying out of the railroad through and over his land. The damages which the court ruled that the plaintiff would be entitled to recover were not occasioned by the laying out of the road over the plaintiff's land, but by the construction of the road over the land of other persons. See *Delaware & Raritan Canal Co. v. Lee*, 2 *Zabriskie*, 243. The ruling was, that the plaintiff could recover such damages as have been caused him in consequence of the defendants' cutting away the ridge north of the plaintiff's farm.

The defendants contend that the statute, providing for the appraisal of damages, authorized and required the appraisers to take into consideration any and all injury or damage which then, or in the future, might accrue to the plaintiff by reason of the cut through the high ridge, and to include the same in their award; and that therefore the appraisal and subsequent payment furnish a complete bar to this action. The plaintiff concedes that, if the appraisers had authority to include this damage in their award, it must be presumed that they did so. See *Aldrich v. Cheshire Railroad Co.*, 21 *N. H.* 359. Whether the appraisers had such authority depends, of course, upon the construction of the statute. By the statute in force when this railroad was built, it is enacted that the commissioners and selectmen "shall assess the damages sustained by the owners of land in the same way and manner as road commissioners in the several counties are now by law required to do." *Comp. Stat.* ch. 150, § 10. The road commissioners are to assess the damages sustained by owners of land "as selectmen are required to do." *Comp. Stat.* ch. 54, § 7. And selectmen "shall assess the damages sustained by each owner of the land required for such highway." *Comp. Stat.* ch. 52, § 16; see, also, *Blake v. Rich*, 34 *N. H.* 282, 285, 286;

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Dearborn v. B. C. & M. R. R., 24 *N. H.* 179, 185, 186.

What damages are to be awarded by selectmen to owners of land required for a highway? Are they restricted to the damages occasioned by building the highway over such owner's land? or, may they also include the damages done to such owner by reason of the construction of the highway over the land of other persons? It is desirable, in the outset, to ascertain who are entitled to an award of damages under the statute. The term "land required" might, if used in some connections, be construed to include land injuriously affected as well as land actually crossed by the highway; but other clauses in the highway statutes render it quite clear that this term is here used in the latter sense. Thus, when a new highway is petitioned for, the selectmen are to give notice "to the owners of the land over which the same may pass." *Comp. Stat.* ch. 52, §§ 2 and 6. So, if a proposed highway "may pass over lands not in any town, the court shall order notice to be given to the owner thereof." *Comp. Stat.* ch. 53, § 3. In Kennett's Petition, 24 *N. H.* 139, the court (per BELL, J.) said,—“Upon examination of the Revised Statutes we can find no provision for the allowance of damages to any persons but the owners of lands over which the new highway is laid.” See, also, *People ex rel. Newton v. Supervisors of Oneida County*, 19 *Wend.* 102. No "owner," then, can claim damages under the statute, unless some portion of his land is crossed by the road. If only the owner whose land is crossed can claim damages, it would seem that the legislature intended that the damages to be awarded to him should be confined to the injuries occasioned by the crossing of his own land. It is solely by reason of such crossing that the statute gives him any right to have damages appraised by the selectmen at all. The statute, as construed in Kennett's Petition, reads thus :

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"Those persons, and those only, whose land is actually crossed by the road, are entitled to have their damages assessed by the selectmen." Damages, how sustained? Damages, for what? The natural answer is, the damages occasioned by the doing of the act which gives them a right to claim damages, namely, the building of the road over their own land. The language of the statute is broad enough to include actionable damage to the remaining land of an owner by reason of the building of the road over a portion of his land (see *Dearborn v. B. C. & M. R. R.*, 24 *N. H.* 179, 185-187); but we think it does not include damages caused to him by the building of the road over the land of another.

If it be conceded that the legislature ought to have provided for the assessment of such damages, this undoubtedly presents a consideration to be weighed in determining the meaning of their language, but it does not absolutely necessitate the conclusion that they have made such provision. "It is only in case of some reasonable doubt of the meaning of the legislature, founded in the language of the act," that such a consideration can control the court in its construction. And the omission to provide for this case does not necessarily involve the imputation that the legislature deliberately intended to transcend their constitutional power. It is not altogether improbable that the contingency that any damage might occur to a land owner from the construction of the road over the land of another was not contemplated by the legislature. See *KENT*, Ch., in *Gardner v. Village of Newburgh*, 2 *Johns. Ch.* 162, 168. The early legislation on the subject of railroads was imperfect. See *REDFIELD*, Ch. J., in 25 *Vt.* 58. Or if the contingency did occur to the legislature as possible, they might have supposed that it would result in only a few cases, and that it would be better, in those exceptional instances, to leave the

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corporation exposed to liability in a common-law action, than to attempt the very difficult task of estimating such damages prior to the construction of the road. It is comparatively easy to estimate the prospective damages which will be occasioned to a lot of land by the building of a railroad over that lot. But it is quite a different matter to estimate the probable damage which will be caused to that lot by the construction of the road over numerous lots belonging to other persons, many of them situated at a considerable distance. The judgment of the appraisers on such a question would be extremely likely to be at fault. After a road is built, actual occurrences will afford more certain data for such an estimate. But the damages awarded under the statute are ordinarily to be assessed and paid before the making of the road. *Comp. Stat.* ch. 150, §§ 16, 17. An estimate of such damages, made prior to the building of the road, but conclusive upon the parties for all coming time, would often fail to even approximate to correctness.

Decisions in other jurisdictions, upon the construction of statutes differing in phraseology from our own, are not in point. See *Indiana Central R. R. Co. v. Boden*, 10 *Indiana*, 96; *Wabash & Erie Canal v. Spears*, 16 *Indiana*, 441; *DAVISON, J.*, in *Evansville & Crawfordsville R. R. Co. v. Dick*, 9 *Indiana*, 433, p. 435; *GREEN, Ch. J.*, in *Delaware & Raritan Canal Co. v. Lee*, 2 *Zabriskie*, 243, p. 249; *Regina v. Eastern Counties Railway*, 2 *Queen's Bench*, 347; *Dodge v. Commissioners*, 3 *Metc.* 380; *Whitehouse v. Androscoggin R. R. Co.*, 52 *Me.* 208; *Parker v. B. & Me. R. R.*, 3 *Cush.* 107. If the construction of the statute in question has not already been settled adversely to the plaintiff by a decision in this State, the court are unanimously of opinion that the statute should be construed as not authorizing an appraisal of the damages covered by the ruling in this case, and that the appraisal conse-

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quently does not bar the action. I am not prepared to say that the decision in *Concord R. R. v. Greely*, 23 *N. H.* 237, is not an authority for the defendants on this point; but no other member of the court is inclined to regard it in that light, and it is therefore unnecessary to consider whether, if it were held to be in point, the court ought to go to the length of overruling it. As the decision in *Concord R. R. v. Greely* was not made until December, 1851, it seems that it could not have affected the appraisal in question. It is satisfactory to know that our view that these damages were not included in the appraisal coincides with the contemporary understanding of the defendants. Of this, the language of the release affords conclusive evidence. It is obvious that the release does not include the damages in question; and it is equally obvious that the corporation could not have thought it worth while to take a release from the plaintiff which covered less than they understood to be included in the award.

The defendants' first position is, that the plaintiff has already received compensation for this damage. This position the court have now overruled. The defendants' next position is, that the plaintiff is not legally entitled to receive any compensation, but is bound to submit to the infliction of this damage without any right of redress. The argument is not put in the precise words we have just used, but that is what we understand them to mean. The defendants say that the legislative charter authorized them to build the road, if they did it in a prudent and careful manner; that they constructed the road at the cut with due care and prudence; and that they cannot be made liable as tortfeasors for doing what the legislature authorized them to do. This involves two propositions: first, that the legislature have attempted to authorize the defend-

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ants to inflict this injury upon the plaintiff without making compensation; and, second, that the legislature have power to confer such authority. There are decisions which tend to show that the charter should not be construed as evincing any legislative intention to authorize this injury, or to shield the defendants from liability in a common-law action. *Tinsman v. Belvidere Delaware R. R. Co.*, 2 *Dutch. (N. J.)* 148; *Sinnickson v. Johnson*, 2 *Harr. (N. J.)* 129; *Hooker v. New Haven & Northampton Co.*, 14 *Conn.* 146; *Fletcher v. Auburn & Syracuse R. R. Co.*, 25 *Wend.* 462; *Brown v. Cayuga & Susquehanna R. R. Co.*, 12 *N. Y. (2 Kern.)* 486, p. 491; see, also, *Eastman v. Company*, 44 *N. H.* 143, p. 160; *Hooksett v. Company*, 44 *N. H.* 105, p. 110; *Company v. Goodale*, 46 *N. H.* 53, p. 57; *BARROWS, J.*, in *Lee v. Pembroke Iron Co.*, 57 *Me.* 481, p. 488. But we propose to waive inquiry on this point, and to consider only the correctness of the second proposition, or, in other words, the question of legislative power.

The defendants cannot claim protection under an implied power, where an express power would be invalid; the legislature cannot do indirectly what they cannot do directly. Unless an express provision in the charter, authorizing the infliction of this injury without making compensation, would be a valid exercise of legislative power, the defendants cannot successfully set up the plea that the injury was necessarily consequent upon the exercise of their chartered powers, and therefore impliedly authorized. The defense, then, really presents this question: Have the legislature power to authorize the railroad corporation to divert the waters of the river, by removing a natural barrier, so as to cause the waters "sometimes in floods and freshets" to flow over the plaintiff's land, "carrying sand, gravel, and stones" upon his farm, without making any provision for his compensation?

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Although the constitution of this State does not contain, in any one clause, an express provision requiring compensation to be made when private property is taken for public uses, yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation; and it is understood to be the settled law of the State, that the legislature cannot constitutionally authorize such a taking without compensation. *Piscataqua Bridge v. N. H. Bridge*, 7 *N. H.* 35, 66, 70; *PERLEY*, Ch. J., in *Petition of Mount Washington Road Co.*, 35 *N. H.* 134, 141, 142; *SARGENT*, J., in *Eastman v. Amoskeag Manuf. Co.*, 44 *N. H.* 143, 160; *State v. Franklin Falls Co.*, 49 *N. H.* 240, 251. The counsel for the defendants have not been understood to question the correctness of this interpretation of the constitution.

The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. It might seem that to state such a question is to answer it; but an examination of the authorities reveals a decided conflict of opinion. The constitutional prohibition (which exists in most, or all of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read, "No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable." To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking the property altogether." These views seem to us to be founded on a misconcep-

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tion of the meaning of the term "property," as used in the various State constitutions.

In a strict legal sense, land is not "property," but the subject of property. The term "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification "means only the rights of the owner in relation to it." "It denotes a right over a determinate thing." "Property is the right of any person to possess, use, enjoy, and dispose of a thing." SELDEN, J., in *Wynehamer v. People*, 13 *N. Y.* 378, 433; 1 *Blackstone Com.* 138; 2 *Austin on Jurisprudence*, 3 ed. 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference "takes," *pro tanto*, the owner's "property." The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. "Use is the real side of property." This right of user necessarily includes the right and power of excluding others from using the land. See 2 *Austin on Jurisprudence*, 3 ed. 836; WELLS, J., in *Walker v. O. C. W. R. R.*, 103 *Mass.* 10, 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's "property." If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes "property,"—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A.'s unlimited right of using one hundred acres of

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land to a limited right of using the same land, may work a far greater injury to A. than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a "taking of property." Why not the former?

If, on the other hand, the land itself be regarded as "property," the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. If the land, "in its corporeal substance and entity," is "property," still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make "property" valuable. Among these elements is, fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See COMSTOCK, J., in *Wynehamer v. The People*, 13 N. Y. 378, 396. A physical interference with the land, which substantially abridges this right, takes the owner's "property" to just so great an extent as he is thereby deprived of this right. "To deprive one of the use of his land is depriving him of his land;" for, as Lord COKE said, — "What is the land but the profits thereof?" SUTHERLAND, J., in *People v. Kerr*, 37 Barb. 357, 399; *Co. Litt.* 4 b. The private injury is thereby as completely effected as if the land itself were "physically taken away."

The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount or value of

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the property taken in the two instances may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part "is as much forbidden by the constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same." See 6 *Am. Law Review*, 197, 198; LAWRENCE, J., in *Nevins v. City of Peoria*, 41 *Illinois*, 502, 511. The explicit language used in one clause of our constitution indicates the spirit of the whole instrument. "No part of a man's property shall be taken" *Const. of N. H.*, Bill of Rights, art. 12. The opposite construction would practically nullify the constitution. If the public can take part of a man's property without compensation, they can, by successive takings of the different parts, soon acquire the whole. Or, if it is held that the complete divestiture of the last scintilla of interest is a taking of the whole for which compensation must be made, it will be easy to leave the owner an interest in the land of infinitesimal value.

The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that described in many other cases. First, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession. Second, it would clearly be actionable if done by a private person without legislative authority. The damage is "consequential," in the sense of not following immediately in point of time upon the act of cutting through the ridge, but

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it is what Sir WILLIAM ERLE calls "consequential damage to the actionable degree." See *Brand v. H. & C. R. Co.*, *Law Reports, 2 Queen's Bench*, 223, 249. These occasional inundations may produce the same effect in preventing the plaintiff from making a beneficial use of the land as would be caused by a manual asportation of the constituent materials of the soil. Covering the land with water, or with stones, is a serious interruption of the plaintiff's right to use it in the ordinary manner. If it be said that the plaintiff still has his land, it may be answered, that the face of the land does not remain unchanged, and that the injury may result in taking away part of the soil ("and, if this may be done, the plaintiff's dwelling-house may soon follow"); and that even if the soil remains, the plaintiff may, by these occasional submergings, be deprived of the profits which would otherwise grow out of his tenure. "His dominion over it, his power of choice as to the uses to which he will devote it, are materially limited." *BRINKERHOFF, J.*, in *Reeves v. Treasurer of Wood County*, 8 *Ohio St.* 333, 346.

The nature of the injury done to the plaintiff may also be seen by adverting to the nature of the right claimed by the defendants. The primary purpose of the defendants in cutting through the ridge was to construct their road at a lower level than would otherwise have been practicable. But, although the cut was not made "for the purpose of conducting the water in a given course" on to the plaintiff's land, it has the result; and the defendants persist in allowing this excavation to remain, notwithstanding the injury thereby visibly caused to the plaintiff. Rather than raise the grade of their track, they insist upon keeping open a canal to conduct the flood waters of the river directly on to the plaintiff's land. If it be said that the water came naturally from the southerly end of the cut on to the plaintiff's land, the answer is, that the water did

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not come naturally to the southerly end of the cut. It came there by reason of the defendants' having made that cut. In consequence of the cut, water collected at the southerly boundary of the ridge, north of the plaintiff's farm, which would not have been there if the ridge had remained in its normal and unbroken condition. They have "so dealt with the soil" of the ridge, that, if a flood came, instead of being held in check by the ridge, and ultimately getting away by the proper river channel without harm to the plaintiff, it flowed through where the ridge once was on to the plaintiff's land. "Could the defendants say they were not liable because they did not cause the rain to fall," which resulted in the freshet; or because the water "came there by the attraction of gravitation?" See *BRAMWELL*, Baron, in *Smith v. Fletcher*, *Law Reports*, 7 *Exch.* 305, 310. If the ridge still remained in its natural condition, could the defendants pump up the flood water into a spout on the top of the ridge, and thence, by means of the spout, pour it directly on to the plaintiff's land? If not, how can they maintain a canal through which the water by the force of gravitation will inevitably find its way to the plaintiff's land? See *AMES*, J., in *Shipley v. Fifty Associates*, 106 *Mass.* 194, 199, 200; *CHAPMAN*, C. J., in *Salisbury v. Herchenroder*, 106 *Mass.* 458, 460. To turn a stream of water on to the plaintiff's premises is as marked an infringement of his proprietary rights as it would be for the defendants to go upon the premises in person and "dig a ditch, or deposit upon them a mound of earth." See *LAWRENCE*, J., in *Nevins v. City of Peoria*, 41 *Ill.* 502, 510; *DIXON*, Ch. J., in *Pettigrew v. Village of Evansville*, 25 *Wis.* 223, 231, 236. The defendants may, perhaps, regret that they cannot maintain their track at its present level without thereby occasionally pouring flood water on to the land of the plaintiff. Indeed, the passage of this water through

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the cut may cause some injury to the defendants' road bed. But the advantages of maintaining the track at the present grade outweigh, in the defendants' estimation, the risk of injury by water to themselves and to the plaintiff. In asserting the right to maintain the present condition of things as to the cut, the defendants necessarily assert the right to produce all the results which naturally follow from the existence of the cut. In effect, they thus assert a right to discharge water on to the plaintiff's land. Such a right is an easement. A right of "occasional flooding" is just as much an easement as a right of "permanent submerging;" it belongs to the class of easements which "are by their nature intermittent—that is, usable or used only at times." See *Goddard's Law of Easements*, 125. If the defendants had erected a dam on their own land across the river below the plaintiff's meadow, and by means of flush-boards thereon had occasionally caused the water to flow back and overflow the plaintiff's meadow so long and under such circumstances as to give them a prescriptive right to continue such flowage, the right thus acquired would unquestionably be an "easement." The right acquired in that case does not differ in its nature from the right now claimed. In the former instance, the defendants flow the plaintiff's land by erecting an unnatural barrier below his premises. In the present instance, they flow his land by removing a natural barrier on the land above his premises. In both instances, they flow his land by making "a non-natural use" of their own land. In both instances, they do an act upon their own land, the effect of which is to restrict or burden the plaintiff's ownership of his land (see *Leconfield v. Lonsdale*, *Law Reports*, 5 Com. Pleas, 657, 696); and the weight of that burden is not necessarily dependent upon the source of the water, whether from below or above. See *BELL, J.*, in *Tillotson v. Smith*, 32 *N. H.* 90, 95, 96. In both instances

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they turn water upon the plaintiff's land "which does not flow naturally in that place." If the right acquired in the former instance is an easement, equally so must be the right claimed in the latter. If, then, the claim set up by the defendants in this case is well founded, an easement is already vested in them. An easement is property, and is within the protection of the constitutional prohibition now under consideration. If the defendants have acquired this easement, it cannot be taken from them, even for the public use, without compensation. But the right acquired by the defendants is subtracted from the plaintiff's ownership of the land. Whatever interest the defendants have acquired in this respect the plaintiff has lost. If what they have gained is property, then what he has lost is property. If the easement, when once acquired, cannot be taken from the defendants without compensation, can the defendants take it from the plaintiff in the first instance without compensation? See BRINKERHOFF, J., *ubi sup.*; SELDEN, J., in *Williams v. N. Y. Central R. R.*, 16 *N. Y.* 97, 109. An easement is all that the railroad corporation acquire when they locate and construct their track directly over a man's land. The fee remains in the original owner. *Blake v. Rich*, 34 *N. H.* 282. Yet nobody doubts that such location and construction is a "taking of property," for which compensation must be made. See REDFIELD, J., in *Hatch v. Vt. Central R. R.*, 25 *Vt.* 49, 66. What difference does it make in principle whether the plaintiff's land is incumbered with stones, or with iron rails? whether the defendants run a locomotive over it, or flood it with the waters of Baker's river? See WILCOX, J., in *March v. P. & C. R. R.*, 19 *N. H.* 372, 380; WALWORTH, Chan., in *Canal Commissioners and Canal Appraisers v. People*, 5 *Wend.* 423, 452.

If it should be held that the legislature had conferred a valid authority upon the defendants to make

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this cut, if necessary to the construction of the railroad, or if made with care and skill, the question of necessity or of care would become material, and might have to be decided by a jury. See *Johnson v. Atlantic & St. L. R. Co.*, 35 *N. H.* 569; *Estabrooks v. P. & S. R. Co.*, 12 *Cush.* 224; *Mellen v. Western R. R.*, 4 *Gray*, 301; *Curtis v. Eastern R. R.*, 14 *Allen* 55; Same Case, 98 *Mass.* 428. But in the view now taken, these questions are immaterial. The defendants are not held liable, as in some other cases, because their acts were unnecessary, or unskillful, and hence not within the contemplation of the charter. They are held liable, irrespective of any negligence on their part, on the ground that it was beyond the power of the legislature to authorize the infliction of this injury on the plaintiff, without making provision for his compensation.

We think that here has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted make no provision for the plaintiff's compensation, they afford no justification; that the defendants are liable in this action as wrong-doers; and that the ruling of the court was correct. These conclusions, which are supported by authorities to which reference will soon be made, seem to us so clear, that, if there were no adverse authorities, it would be unnecessary to prolong the discussion of this case. But, as there are respectable authorities which are in direct conflict with these conclusions, it has been thought desirable to examine some arguments which have, at various times, been advanced in support of the opposite view.

In some instances, as soon as it has been made to appear that there is a legislative enactment purporting to authorize the doing of the act complained of, the complaint has been at once summarily disposed of by the court statement "that an act authorized by law cannot be a tort." This is begging the question. It as-

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sumes the constitutionality of the statute. If the enactment is opposed to the constitution, it is "in fact no law at all." "The term *unconstitutional law*, in American jurisprudence, is a mishomer, and implies a contradiction." "The will of the legislature is only law when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen." *Cooley's Constitutional Limitations*, 1 ed. 3, 4. The error in question originates in a "fallacy of reference." It arises from following English authorities, without advertng to the immense difference between the practically omnipotent powers of the British parliament and the comparatively limited powers of our State legislatures, acting under the restrictions of written constitutions. Parliament is the supreme power of the realm. It is at once a legislature and a constitutional convention. 1 *De Tocqueville's Democracy in America*, Reeves's Translation, 2 Am. ed. 80. Parliament can "do everything that is not naturally impossible;" and what it does "no authority on earth can undo." 1 *Blackstone's Com.* 161; 4 *Coke's Inst.* 36. A State legislature, on the other hand, "is powerless when it attempts to pass the limits prescribed by the constitution." See *Cooley's Const. Lim.* 1 ed. 45, 46. In England, whenever it appears that the act complained of was authorized by a parliamentary statute, the court are perfectly justified in dismissing the complaint, on the ground that the act was "authorized by law." In this country, when it appears that the legislature have gone through the form of enacting a statute purporting to authorize the act complained of, the further inquiry remains, whether the legislature had the constitutional power to pass such a statute. If they had not, then their enactment is not "law," and can afford no justification. The error of blindly following English authorities, as to the justification afforded by statutory

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enactments, has repeatedly been exposed. SWAN, J., in *Crawford v. Village of Delaware*, 7 *Ohio St.* 459, 466, 477; MAISON, Senator, in *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 *Wend.* 9, 29-31; ARCHER, Ch. J., in *Barron v. Mayor of Baltimore*, 2 *Amer. Jurist*, 210; SMITH, J., in *Goodall v. City of Milwaukee*, 5 *Wis.* 32, 38, 45; *Cooley's Const. Lim.* 1 ed. 85; and see, also, *Angell on Watercourses*, 6 ed. § 461; SUTHERLAND, J., in *People v. Kerr*, 37 *Barb.* 357, 412, 415; 1 *Redf. on Railways*, 4 ed. 232.

The error in the argument just commented upon may, perhaps, be summed up in the statement, that it confounds the legislature with the constitutional convention. Closely allied to this is the error of confounding the legislature with the supreme court. It seems to have been contended that the legislature is competent to determine whether a franchise will be injurious to other interests, and that it is to be presumed, after a legislative grant, "that there is no just claim for resulting damages which has not been provided for." See *American Law Magazine*, vol. 1, No. 1, April, 1843, 58-60. This assumes both the omniscience and omnipotence of the legislature. If the legislators themselves are to finally decide whether they have transcended their constitutional powers, "then," in the words of Daniel Webster, "the constitution ceases to be a legal and becomes only a moral restraint upon the legislature." It "is admonitory or advisory only, not legally binding" Speech on The Independence of the Judiciary, quoted in *Cooley's Const. Lim.* 1 ed. 46, note 1. It is now universally conceded to be the province and duty of the judiciary to pass upon the constitutionality of statutes; but it is to be regretted that some courts have manifested excessive reluctance to pronounce statutes unconstitutional. "Whatever respect may be due to the legislature, that due to the constitution is still greater." LAWRENCE, J.,

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in *Bunn v. People*, 45 *Illinois*, 397, 419. The result has sometimes been "to sacrifice the individual to the community." See *Sedgwick on Damages*, 5 ed. 121, 122. "It is not," said Mr. Sedgwick, "an agreeable observation to make, but I believe it cannot be denied, that the protection afforded by the English government to property is much more complete in this respect than under our system, although Parliament claim to be despotically supreme, and although we boast our submission to constitutional restrictions. . ." *Sedgwick on Stat. and Const. Law*, 523, 524, note. Parliamentary acts, at the present time, usually contain carefully drawn clauses, scrupulously providing for the indemnity of those who are liable to be injured by the exercise of the powers granted by the act. In this country it too often happens that the legislature neglect to carefully perform this duty, and the failure of the courts to pronounce the act unconstitutional leaves the injured party without remedy. In view of the "form that the constitutional provision has assumed" in the hands of some courts, "it must," said the same author, "be admitted that in practice our constitutional guarantees are very flexible things. . ." *Sedgwick on Stat. and Const. Law*, 534.

It is said that "if the legislature is competent to furnish the remedy, there is no denial of justice, though no action can be sustained at law." 1 *Amer. Law Magazine*, April, 1843, 57. Leave to apply to a future legislature for an act of indemnity is not the "certain remedy" to which (by art. 14 of the Bill of Rights) every subject is entitled "for all injuries he may receive . . . in his property." Besides, "is the obligation to make him compensation any stronger upon a future legislature than it was on that one by whose authority his property has been taken;" and if they have "failed to make a constitutional provision for his compensation," "what assurance can he

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have" that any future legislature will do so? "It was, however, to place the rights of property upon higher grounds than the mere legislative sense of justice and equity, that this prohibition upon legislative power was embodied in the bill of rights." MOORE, J., in *Buffalo B. B. & C. R. R. Co. v. Ferris*, 26 *Texas*, 588, 602.

It has been contended that in order to establish the position "that the right of action in behalf of the party injured" is "the same as if no charter existed," "it is necessary to show that the grant" of the franchise "is absolutely void." 1 *Amer. Law Magazine*, 64. It is undoubtedly necessary to show that the charter is void, in so far as it purports to authorize the infliction of the injury in question; but not that it is void in all other respects, conferring no valid rights as against any person whatever. If the legislature grant a charter purporting to authorize the grantee to take the property of A. for public use upon making compensation, and the property of B. without making compensation, the charter is invalid as against B., but may confer a right as against A. It is familiar law that "where an agent exceeds his authority, what he does within it is valid, if that part be distinctly severable from the remainder." 1 *Parsons on Contracts*, 4 ed. 58. The same principle applies to the exercise by the legislature of the power delegated to them by the constitution. No sound argument can be founded upon the hardship to the grantees of not receiving all that the legislature undertook to convey to them. Conceding that the grantees, by assuming the performance of the duties required of them by the charter, have paid a full consideration for all the privileges which the charter purported to convey to them, how does their case differ from that of other unfortunate persons who have purchased property of an irresponsible party who had no right to sell? Is the fact that the purchaser paid a full consideration

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to the wrongful vendor allowed to divest the title of the true owner? Yet, upon what other theory can it be said (1 *Amer. Law Magazine*, 75) that "we cannot look beyond the charter itself to determine the duties and liabilities of the grantee?"

The consideration is sometimes urged, that the building of a railroad is a work of great public convenience and benefit. This may afford an excellent reason for taking the plaintiff's land in the constitutional manner, but not for taking it without compensation. If the work is one of great public benefit, "the public can afford to pay for it." GREEN, Chan., in *Hinchman v. Paterson Horse R. R. Co.*, 2 *C. E. Green* (N. J.) 75, 80; PARKER, Ch. J., in *Piscataqua Bridge v. N. H. Bridge*, 7 *N. H.* 35, 64. "Either, therefore, the railway ought not to be made, or the damage may well be paid for." BRAMWELL, Baron, in *Brand v. H. & C. R. R. Co.*, 2 *Queen's Bench*, 223, 231. "In the case at bar, the plaintiff is expected to give his land . . . Why is he called upon rather than another?" COLE, J., in *Cash v. Whitworth*, 13 *Louisiana Annual*, 401, 403. "Taxation exacts money from individuals as their share of a justly imposed and apportioned public burden, and the equivalent is presumptively received in the benefits conferred by the government. Property taken for public use from one or more individuals only, by right of eminent domain, is taken, not as his or their share of an apportioned public burden, but as something distinct from and more than his or their share of the public burdens, and therefore the justice and necessity of a constitutional provision for compensation." BUTLER, J., in *Booth v. Town of Woodbury*, 32 *Conn.* 130; RUGGLES, J., in *People v. Mayor of Brooklyn*, 4 *N. Y.* 419, 424. In *Street Railway v. Cumminsville*, 14 *Ohio St.* 523, it was found as a fact, that, taking into consideration the interests of the company and the general

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traveling public, as well as those of the lot owners, the location was "as little injurious as it would be in any other part of the highway." "This," said RANNEY, J., 550, "is the common case, where private property is taken for public uses. Reduced into plain English, it simply amounts to this, that the company and the public will gain as much as the lot owners lose. The difficulty of giving this any effect in the present case arises from the fact that the justice of the constitution has provided that what the one thus gains and the other loses shall be paid for, before the property is taken or invaded." "If," said WILLIAMS, J., in 3 *Bush (Kentucky)*, 429, 430, "the improvement is of great public utility, it will not be an onerous burden for the public to pay the damage; if so, it would, of course, be a much greater and peculiar burden and hardship on these individual proprietors. If the damages are great, they should not be imposed to the destruction of the individual proprietors. If they are not great, the burden on the public will be light. If too heavy to be imposed on the public, this should admonish the authorities not to impose them on the individual proprietors." WILLIAMS, J., in *Louisville v. Rolling Mill Co.*, 3 *Bush (Kentucky)*, 416, 429, 430; and see WILLIAMS, Ch. J., in *Enfield Toll Bridge Co. v. Hartf. & N. H. R. R. Co.*, 17 *Conn.* 40, 58, 59.

It is said that a land owner is not entitled to compensation where the damage is merely "consequential." The use of this term "consequential damage" "prolongs the dispute," and "introduces an equivocation which is fatal to any hope of a clear settlement." It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of; what ERLE, Ch. J., aptly terms "consequential damage to the

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actionable degree." *Brand v. H. & C. R. Co.*, *Law Reports*, 2 *Queen's Bench*, 223, 249. It is thus used to signify damage which is recoverable at common law in an action of case, as contradistinguished from an action of trespass. On the other hand, it is used to denote a damage which is so remote a consequence of an act that the law affords no remedy to recover it. The terms "remote damages" and "consequential damages" "are not necessarily synonymous, or to be indifferently used. All remote damages are consequential, but all consequential damages are by no means remote." *Sedgwick on Damages*, 5 ed. 56. When, then, it is said that a land owner is not entitled to compensation for "consequential damage," it is impossible either to affirm or deny the correctness of the statement until we know in what sense the phrase "consequential damage" is used. If it is to be taken to mean damage which would not have been actionable at common law if done by a private individual, the proposition is correct. The constitutional restriction was designed "not to give new rights, but to protect those already existing." *Pierce on Am. R. R. Law*, 173; and see *Rickett v. Directors, &c. of Metropolitan R. R. Co.*, *Law Reports*, 2 *House of Lords*, 175, 188, 189, 196. But this does not concern the present case, where it is virtually conceded that the injury would have been actionable if done by a private individual not acting under statutory authority. If, upon the other hand, the phrase is used to describe damage, which, though not following immediately in point of time upon the doing of the act complained of, is nevertheless actionable, there seems no good reason for establishing an arbitrary rule that such damage can in no event amount to a "taking of property."

The severity of the injury ultimately resulting from an act is not always in inverse proportion to the lapse of time between the doing of the act and the production

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of the result. Heavy damages are recovered in case as well as in trespass. The question whether the injury constitutes a "taking of property" must depend on its effect upon proprietary rights, not on the length of time necessary to produce that effect. If a man's entire farm is permanently submerged, is the damage to him any less because the submerging was only the "consequential" result of another's act? It has been said "that a nuisance by flooding a man's land was originally considered so far a species of ouster, that he might have had a remedy for it by assize of novel disseizin;" but if it be conceded that at present the only common-law remedy is by an action on the case, that does not change the aspect of the constitutional question. The form of action in which the remedy must be sought cannot be decisive of the question whether the injury falls within the constitutional prohibition. "We are not to suppose that the framers of the constitution meant to entangle their meaning in the mazes" of the refined technical distinctions by which the common-law system of forms of action is "perplexed and incumbered." Such a test would be inapplicable in a large proportion of the States, where the distinction between trespass and case has been annihilated by the abolition of the old forms of action. We are not alone in the opinion that the phrase "consequential damage" has been misapplied in some of the discussions on this constitutional question;—see the criticisms of MILLER, J., in *Pumpelly v. Green Bay Co.*, 13 *Wall.* 166, 180; PAINE, J., in *Alexander v. City of Milwaukee*, 16 *Wis.* 247, 258; SUTHERLAND, J., in *People v. Kerr*, 37 *Barb.* 357, 403, 408;—and we think that the confusion thus engendered will account for some erroneous decisions. If this most ambiguous expression is to be used at all in this connection, the meaning attached to it should always be clearly defined as is done in *Pierce on Am. Railroad Law*, 173.

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It may perhaps be urged that a decision in favor of the plaintiff will give rise to a multiplicity of suits by other claimants, many of whom have sustained no substantial damage. But this affords no ground for denying redress to this plaintiff, who has clearly sustained a substantial injury. Nor will the present decision be a precedent in future cases differing in their nature from the one before us. The answers given by other courts to similar objections are quite decisive. *Ld. DENMAN*, Ch. J., in *Regina v. Eastern Counties R. Co.*, 2 *Q. B.* 347, 362, 363; *MONTAGUE SMITH*, J., in *Brand v. H. & C. R. Co.*, *Law Rep.*, 2 *Q. B.* 223, 245; *PARKER*, Ch. J., in *Boston & Roxbury Mill Corp. v. Gardner*, 2 *Pick.* 33, 38, 39.

Our conclusion, that the second ground of defense set up in this case must be overruled, is supported by *Pumpelly v. Green Bay Co.*, 13 *Wall.* 166; *Evansville & Crawfordsville R. R. Co. v. Dick*, 9 *Ind.* 433; and by that part of the decision in *Richardson v. Vermont Central R. R. Co.*, 25 *Vt.* 465, which holds the plaintiff entitled to recover for damage occasioned by his land's falling into the cut. See, also, *Hay v. Cohoes Co.*, 2 *N. Y.* 159; *RANNEY*, J., in *Carman v. Steubenville & Indiana R. R. Co.*, 4 *Ohio St.* 399, 413. In *Hooker v. New Haven & North Hampton Co.*, 14 *Conn.* 147; *S. C.*, 15 *Conn.* 312, it was held that no intent of the legislature to authorize the injury was apparent; but some of the reasoning of *WILLIAMS*, Ch. J., tends very strongly to show that an attempt to confer such authority would have been unavailing. See 14 *Conn.* 151-162; 15 *Id.* 317, 319, 321, 325.

There are also numerous cases in which the decisions, or *dicta*, tend to sustain the principle of the present decision. *People v. Nearing*, 27 *N. Y.* 306, 308, 310; *BRINKERHOFF*, J., in *Reeves v. Treasurer of Wood County*, 8 *Ohio St.* 333, 346; and see in this connection *Tide Water Co. v. Coster*, 3 *C. E. Green (N. J.)*

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158; S. C., *Id.* 54, Matter of Bushwick-avenue, 48 *Barb.* 9, 12, J. F. BARNARD, J.; MULLIN, P. J., in Village of Lancaster v. Richardson, 4 *Lans.* 136, 141; Lee v. Pembroke Iron Co., 57 *Me.* 481, 488, BARROWS, J.; BIGELOW, J., in Brigham v. Edmands, 7 *Gray*, 359, 363; ZABRISKIE, Chan., in Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken Horse R. R. Co., 20 *N. J. Ch.* (5 *C. E. Green*) 61, 62; Gardner v. Village of Newburgh, 2 *Johns. Ch.* 162; BECK, J., in McCord v. High, 24 *Iowa*, 336, 342; Woodruff v. Neal, 28 *Conn.* 165; VALENTINE, J., in U. P. R. W. Co. E. D. v. Rollins, 5 *Kans.* 167, 176, 177, and in Caulkins v. Mathews, *Id.* 191, 200; People v. Platt, 17 *Johns.* 195; State v. Glen, and Cornelius v. Glen, 7 *Jones Law* (*N. C.*) 321, 512; Crenshaw v. Slate River Co., 6 *Rand.* (*Va.*) 245; State v. Franklin Falls Co., 49 *N. H.* 240, 251; State v. Laverack, 34 *N. J. Law* (5 *Vroom* 201); *Exp.* Martin, 8 *Eng. (Ark.)* 198; Attorney General v. Germantown, &c. Turnpike Road, 55 *Penn. St.*, 466; Glover v. Powell, 2 *Stockton Ch. (N. J.)* 211; HOAR, J., in Morgan v. Stocker, 1 *Allen*, 150, 157, 158; Moale v. Mayor of Baltimore, 5 *Md.* 314, LE GRAND, C. J., 321, 322. See, also, J. C. SMITH, J., in Morgan v. King, 35 *N. Y.* 454, 457; WALWORTH, Chan., in Canal Commissioners and Canal Appraisers v. People, 5 *Wend.* 423, 448; Barclay R. R. & Coal Co. v. Ingham, 36 *Penn. St.* 194; BIRCHARD, C. J., in Walker v. Board of Public Works, 16 *Ohio*, 540, 544, 545; ELLIOTT, J., in City of Columbus v. Hydraulic W. M. Co., 33 *Ind.* 435, 438, 439; Murray v. Sharp, 1 *Bos.* 539; Yates v. Milwaukee, 10 *Wall.* 497; E. DARWIN SMITH, J., in Robinson v. N. Y. & Erie R. R., 27 *Barb.* 512, 522. Reference may also be made to "the weight of the judicial authority" "against the power of the legislature to appropriate a common highway to the purposes of a railroad, unless at the same time provi-

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sion is made for compensation to the owners of the fee." *Cooley's Const. Lim.* 1 ed. 545-547.

This conclusion is also supported by the definitions given by various judges and text-writers to the phrase "a taking of property." See, in addition to the foregoing citations, *Angell on Watercourses*, 6 ed. § 565 a; *Cooley Const. Lim.* 1 ed. 544; WILDE, J., in *Austin v. Murray*, 16 *Pick.* 121, 126; PUTNAM, J., in *Boston and Roxbury Mill Corp. v. Newman*, 12 *Pick.* 467, 482; NEVIUS, J., in *Ten Eyck v. Delaware and Raritan Canal Co.*, 3 *Harrison (N. J.)* 200, 205; *Exp. Jennings*, 6 *Cow.* 518, 525, 526; WALWORTH, Chan., and ALLEN, Senator, in *Canal Commissioners and Appraisers v. People ex rel. Tibbits*, 5 *Wend.* 423, 452, 456; SUTHERLAND, J., in S. C., 13 *Wend.* 355, 372, 373; WALWORTH, Chan., in S. C., 17 *Wend.* 571, 605; MAISON, Senator, in *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 *Wend.* 9, 34, 35; LEONARD, J., in *Walther v. Warner*, 25 *Mo.* 277, 289; LAWRENCE, J., in *Nevins v. City of Peoria*, 41 *Ill.* 502, 509, 511; ARCHER, Ch. J., in *Barron v. Mayor of Baltimore*, 2 *Am. Jur.* 211, 212 (since overruled, see S. C., 7 *Pet.* 243, 244); SMITH, J., in *Goodall v. Milwaukee*, 5 *Wis.* 32, 39, 45, 46; SELDEN, J., in *Williams v. New York Central R. R.*, 16 *N. Y.* 97, 100, 110; PERKINS, J., in *Wabash & Erie Canal v. Spears*, 16 *Ind.* 441, 443.

It seems to have been sometimes supposed that the decisions opposed to these views are so numerous, that to differ from them might "almost wear the aspect of presumption." Such appears to have been the opinion of Mr. SEDGWICK, who evidently differed, as to the intrinsic merits of the question, from the supposed weight of authority. *Sedgwick on Stat. and Const. Law*, 1 ed. 525, 533, 534. There are, undoubtedly, authorities which are in direct conflict with the present opinion. See, for instance, the decisions in *Bellinger v. New York Central R. R.*, 23 *N. Y.* 42; *West Branch & Susque-*

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hanna Canal Co. v. Mulliner, 68 *Penn. St.* 357; and the *dicta* of GILBERT, J., in *Arnold v. Hudson River R. R. Co.*, 49 *Barb.* 108, 121 (a case in which the result reached may, perhaps, stand well enough on the finding of fact, that the testator accepted the substituted structure as a compensation from the defendants for all damages sustained by him in consequence of their acts). See, also, the remark of GIBSON, Ch. J., that the constitutional prohibition "extends not to the case of property injured or destroyed." *O'Connor v. Pittsburgh*, 18 *Penn. St.* 187, 190. But the number of decisions, necessarily inconsistent with the present conclusions, is much smaller than has sometimes been supposed. If we look "to what has actually been *decided*," in many of the cases, rather than "to what has been *said*," it will be found that the present reasoning would not necessarily have led to a different result.

There are classes or groups of authorities which, upon a superficial examination, might be supposed irreconcilable with our conclusions, but which, in fact, are not in point.

Thus, a petitioner for assessment of damages under a statute may fail to recover damages similar to those claimed here, because the statute did not provide for such a case; but it does not follow that he cannot maintain a common-law action. See *Indiana Central R. Co. v. Boden*, 10 *Ind.* 96; *Proprietors of Locks & Canals v. Nassau & Lowell R. R. Co.*, 10 *Cush.* 385, 388; *Estabrooks v. P. & S. R. R. Co.*, 12 *Cush.* 224. A petitioner under a statute can get nothing more than the statute gives him. The construction, and not the constitutionality of the statute, is the point for decision. Nothing else was decided in reference to Bradley's damages in Kennett's Petition, 24 *N. H.* 139, 143. If the case at bar were a petition under the statute, we should hold, as already intimated, that Eaton could not, in that proceeding, recover the damages claimed in

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this action. On the other hand, a common-law action may fail, because there is a remedy given by statute which is exclusive. *Henniker v. Contoocook Valley R. R.*, 29 *N. H.* 146; *Stevens v. Proprietors of Middlesex Canal*, 12 *Mass.* 466; SHAW, Ch. J., in *Dodge v. County Commissioners*, 3 *Met.* 380, 381, 382. In *Rowe v. Granite Bridge Corporation*, 21 *Pick.* 344, it seems to be assumed that there was a statutory remedy for the damage to real estate; see pp. 345, 346, 348. In Massachusetts the statute provides for an assessment of damages in some cases which are not held to be included in the New Hampshire statutes. Hence, in some instances, an action of tort which would be maintainable in this State might be defeated in Massachusetts, upon the ground that there was an exclusive remedy by petition under the statute. See *Babcock v. Western R. R.*, 9 *Met.* 553; *Mellen v. Western R. R.*, 4 *Gray*, 301; *Estabrooks v. Peterborough & Shirley R. R.*, 12 *Cush.* 224; *Perry v. Worcester*, 6 *Gray*, 544; *Curtis v. Eastern R. R. Co.*, 14 *Allen*, 55; S. C., 98 *Mass.* 428.

So there are cases where the plaintiff fails, not because the act complained of was legal, but because it was a public nuisance—a wrong “to be redressed by a public prosecution, not by recovering damages in a private action,”—the plaintiff’s damages differing “in degree only, not in kind,” from that sustained by the rest of the community. See, for examples, *Blood v. Nashua & Lowell R. R.*, 2 *Gray*, 137, 140, 141; also, SHAW, Ch. J., in *Boston & Worcester R. R. v. Old Colony R. R.*, 12 *Cush.* 605, 606; BENNETT, J. in *Hatch v. Vermont Central R. R.*, 28 *Vt.*, 142, 147; SUTHERLAND, J. in *Lansing v. Smith*, 8 *Cow.* 146, 151-168.

Again: there is a class of cases where the plaintiff has failed, not because the damages complained of did not amount to a “taking of property,” but because it was held that in those instances the plaintiff had already been compensated for it,—the courts holding that the

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damages must, in contemplation of law, be regarded as having been included in the assessment under the statute, or in the purchase money paid to the plaintiff. Examples of this class of cases may be found in *Skinner v. Hartford Bridge Co.*, 29 *Conn.* 523; *Sabin v. Vermont Central R. R.*, 25 *Vt.* 363; *Norris v. Vermont Central R. R.*, 28 *Vt.* 99; *Steele v. Western Inland Lock Navigation Co.*, 2 *Johns.* 283; *Clark v. Hannibal & St. Joseph R. R.*, 36 *Mo.* 202; *Hortsman v. Covington & Lexington R. R. Co.*, 18 *B. Monr.* 218, 222; *Baltimore & Potomac R. R. v. Magruder*, 34 *Md.* 79. And see *Babcock v. Western R. R.*, 9 *Met.* 553, 556. It seems to us that the decision in *Boothby v. Androscoggin & Kennebec R. R.*, 51 *Me.* 318, might well have been put upon this ground. See the clear statement of STILES, J., in the somewhat analogous case of *Hortsman v. Covington & Lexington R. R. Co.*, 18 *B. Monr.* 218, 222. The principle of these cases would be applicable here, if the damage complained of had been occasioned by the construction of the railroad over Eaton's land, instead of over the land of other persons.

There is another class of cases, distinguishable from the present by the fact that the complainant in those cases has been deprived only of the privilege which he had enjoyed, in common with the rest of the public, of using public property. No private or exclusive right is invaded. The act complained of is merely a regulation of a public right. Suppose that the State cause or authorize an obstruction to the navigation of a navigable river which belongs to the State, but do not thereby invade or flood the lands of the riparian owner. The diminished facilities for navigation may render the adjacent land less valuable; but so may a lawful change in the mode of occupying an adjacent tract of land belonging to a private owner. The riparian owner's land remains intact. He is only "deprived of the use of what was never his own." See *Gould v. Hudson River*

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R. R., 6 *N. Y.* (2 *Seld.*) 522; S. C., 12 *Barb.* 616; BARROWS, J., in *Lee v. Pembroke Iron Co.*, 57 *Me.* 481, 486-488; SHAW, Ch. J., in *Davidson v. Boston & Maine R. R.*, 3 *Cush.* 91, 106; STRONG, J., in *People v. Tibbetts*, 19 *N. Y.* 523, 528; FOLGAR, J., in *Coster v. Mayor of Albany*, 43 *N. Y.* 399, 415; Shrunk v. Pres., &c. of Schuylkill Nav. Co., 14 *Serg. & Rawle*, 71; Zimmerman v. Union Canal Co., 1 *W. & S.* 346; Com. v. Richter, 1 *Penn. R. by Rawle, Penrose & Watts*, 462; Monongahela Bridge Co. v. Kirk, 46 *Penn. St.* 112; Clarke v. Birmingham & Pittsburgh Bridge Co., 41 *Id.* 147; Spring v. Russell, 7 *Greenl.* 273 (as explained in 57 *Me.* 486); 3 *Edw. Ch.* 290; and see Commissioners of Homochitto River v. Withers, 29 *Miss.* 21; New York & Erie R. R. v. Young, 33 *Penn. St.* 175; Susquehanna Canal Co. v. Wright, 9 *W. & S.* 9; McKeen v. Delaware Div. Canal Co., 49 *Penn. St.* 424. See, however, Yates v. Milwaukee, 10 *Wall.* 9, 467. In the much considered case of Canal Commissioners and Canal Appraisers v. People *ex rel.* Tibbits, 17 *Wend.* 571; S. C., 13 *Id.* 355, 5 *Id.* 423, the majority of the court disallowed the relator's claim to compensation for the destruction of the waterfall in the Mohawk river, upon the ground that the bed of the Mohawk belonged to the State, and did not pass under the grant of the adjacent land. To the same effect is the decision in *People, ex rel. Loomis v. Canal Appraisers*, 33 *N. Y.* 461. If any decisions or *dicta* go to the length of asserting that the State, under the guise of regulating or improving public property, may infringe on private rights without compensation (see GIBSON, Ch. J., in *Monongahela Nav. Co. v. Coons*, 6 *W. & S.* 101, 113, 114; *Hollister v. Union Co.*, 9 *Conn.* 436), it is only necessary in this connection to point out that such a doctrine, even if correct, is inapplicable to the present case. The improvement of Baker's river "was not within the contemplation of the legislature" in grant-

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ing the defendant's charter, "and no authority for that purpose was given." See GREEN, Ch. J., in *Tinsman v. Belvidere Delaware R. R. Co.*, 2 *Dutcher* (N. J.) 148, 175.

The case at bar is clearly distinguishable from the class of cases where an entry on land for a merely temporary purpose has been held not to be a "taking of property;" as, for example, an entry to perambulate the boundaries of towns, or to make preliminary surveys with a view to determining the location of a proposed railroad (see 1 *Redf. on R.* 4 ed. 240, 241), or "the entry of an officer charged with the execution of a criminal process upon the land of a third person for the purpose of making the arrest." In these instances there is only "a technical trespass," and the damage, in general, is merely nominal. The real estate is not "permanently subjected to a servitude." "The beneficial possession of the owner is not substantially interfered with." See *Winslow v. Gifford*, 6 *Cush.* 327; *Polly v. Sar. and Wash. R. R. Co.*, 9 *Barb.* 449; *WALWORTH*, Chan., in *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 *Wend.* 9, 17; *BIGELOW*, J., in *Brigham v. Edmands*, 7 *Gray*, 359, 363; *LEONARD*, J., in *Walther v. Warner*, 25 *Mo.* 277, 289. This principle is utterly inapplicable here, where the right is claimed to impose a permanent servitude, and where, if the claim is well founded, the defendants will gain and the plaintiff will lose the title to an easement, thus seeming to bring the case within the definition in the *dicta* of *SHEPLEY*, Ch. J., in *Cushman v. Smith*, 34 *Me.* 247, 258, 260. It was claimed in argument by the plaintiff, and not controverted by the defendants, that the damages in the present cases are of a very substantial character. If it is said that consistency requires a construction of the constitutional provision which would extend it to all invasions of real estate, however momentary, which would be actiona-

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ble if committed by a private individual, it may be answered, that the same reason which induces us to deny that the constitutional restriction is confined to the taking of the formal title, also negatives the idea that it was intended to include injuries which are merely technical and nominal. The real substance of the injury, not its technical name in legal phraseology, is the criterion whereby to determine whether it falls within the constitutional restriction.

Bassett v. Salisbury Manufacturing Company, 47 *N. H.* 426, was an application to a court of equity for an injunction to restrain the defendants from flowing the plaintiff's land by means of a dam. It appeared that the company had kept up the water in their dam the entire year, under a claim of right, for about seven years, with the knowledge of the plaintiff and his grantors, and without objection on their part. It also appeared that during the same time the company had made expensive erections of mills and machinery to be operated by the power so gained. It was held that the acquiescence of the plaintiff and his grantors furnished good reason for refusing to exercise the summary power of granting an injunction. That decision is not in point here. The present proceeding is a suit at law. It is not an application to a court of equity to exercise the discretionary power of granting the extraordinary and summary remedy by injunction. Nor are the facts as to the plaintiff's acquiescence, or as to the defendants' change of position, shown to be similar to what was proved in *Bassett v. S. M. Co.*

There are decisions exempting municipal corporations from liability in civil actions for neglect to perform public duties. See *Eastman v. Meredith*, 36 *N. H.* 284; *Bigelow v. Randolph*, 14 *Gray*, 541. There are also decisions exempting municipalities and some classes of public officers from liability for the manner of performing duties of a purely public and judicial

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nature. We do not propose to consider the intrinsic correctness of all the decisions which have proceeded upon these grounds (see DILLON, Ch. J., in *McCord v. High*, 24 *Iowa*, 336, 350), for the principles upon which they are founded do not apply to the present defendants. The damage here complained of results from an act of commission, not omission. The defendants do not stand in the position of public bodies constituted for the sole purpose of executing a public trust or duty, in the performance of which they have no other interest than that which every citizen has. "True, the public benefit may be so far promoted by works authorized to be made by such corporations, that the property of individuals taken by them by virtue of their charters may be deemed to be taken for public use, within the constitutional provision on that subject; still, they exercise their corporative privileges under a private grant of the legislature, conferring upon them specific powers for their own direct and private advantage." "They are trustees of public interests for their own benefit." DAVISON, J., in *Evansville & Crawfordsville R. R. Co. v. Dick*, 9 *Ind.* 433, 435; ARCHER, Ch. J., in *Barron v. Mayor of Baltimore*, 2 *Am. Jur.* 213. The defendants voluntarily accepted their charter with a view to their own private emolument, and do not occupy the position of a municipality invested, without their consent, with powers to be exercised solely for the public benefit. If there can be any analogy between the liabilities of this corporation and of a municipality, it is with reference to the liability of the latter for their manner of managing or dealing with property or rights held by them, "not for the direct and immediate use of the public," but for their own benefit in their corporate capacity. For injuries caused by the improper management or use of property thus held by them, municipal corporations "are liable to the same extent and in the same manner as private corporations and

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natural persons." *Dillon on Municipal Corporations*, § 780; PERLEY, Ch. J., in *Eastman v. Meredith*, 36 *N. H.* 284, 295, 296; GRAY, J., in *Oliver v. Worcester*, 102 *Mass.* 489, 500, 501; and see *Lowenthal v. Mayor of New York*, 61 *Barb.* 511; INGRAHAM, P. J., 520; Mr. Mitchell's note in 5 *Am. Law Reg. N. S.* 44 (explaining *Mills v. Brooklyn*, 32 *N. Y.* 489). We are not disposed to affirm the correctness of the decision in *Alexander v. Milwaukee*, 16 *Wis.* 247 (see the later case of *Pettigrew v. Village of Evansville*, 25 *Id.* 223); but even in that the decision, somewhat reluctantly made in deference to the supposed current of authority relative to municipal corporations, the court did not go to the extent of holding that a private corporation would not have been liable under similar circumstances. See COLE, J., 255; PAINE, J., 257, 248. The cases which relate to the liability of municipalities for injuries caused in changing the grade of highways will be considered hereafter.

There are cases where an action against a corporation must fail, not because the defendants are a chartered body, but because the act complained of would not have been actionable if done by a private individual without legislative authority; the damage being remote, or being caused by "the reasonable use by another of his own property" (*damnum absque injuria*). "If my neighbor sets up a rival store or public house, he injures me, but I cannot sue him." So if the public open a new road, "and thereby draw away custom from my hotel or my stage line, I have no remedy unless one is given by statute." See *Petition of Mt. Washington Road Co.*, 35 *N. H.* 134; *Fuller v. Edings*, 11 *Rich. (S. C.) Law*, 239; *S. C.*, 12 *Id.* 504; *Richmond and Lexington Turnpike Road Co. v. Rogers*, 1 *Duvall (Ky.)* 135. "The removal of a county or State capital will often reduce very largely the value of all the property of the place from whence it was moved ;

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but in neither case can the party injured claim compensation from the public." *Cooley's Const. Lim.* 1 ed. 384. A railroad corporation, in erecting a fence upon their own land to prevent the snow from being blown upon their road, are merely making a proper and reasonable use of their own property; and although such use may cause annoyance or damage to the adjacent land owner, it gives him no cause of action. *Carson v. Western R. R.*, 8 *Gray* 423. *Waffle v. N. Y. Central R. R. Co.*, 58 *Barb.* 413, appears to have been decided upon the same principle. See, also, *Henry v. Vermont Central R. R.*, 30 *Vt.* 638, REDFIELD, J., 641; and *Greeley v. Maine Central R. R.*, 53 *Me.* 200. "Unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed." In cases where the defense of reasonable user is successfully maintained by corporations, "the defendants only ask that the same principle shall be applied to them as to individuals;" they "only ask the same protection that an individual has." See WILLIAMS, Ch. J., in *Burroughs v. Housatonic R. R. Co.*, 15 *Conn.* 124, 132, 133. In the case at bar the defendants ask something more. They claim that their statutory powers protect them from liability for the infliction of an injury which would clearly have been actionable if done by a private person.

Hatch v. Vermont Central Railroad Co., 25 *Vt.* 49, may be noticed in this connection. It was there decided that the defendants were not liable for the action of their embankment in causing the water, "upon the occasion of showers and the melting of the snow," to flow into the plaintiff's store, provided the railroad "was built in a manner to do the plaintiff no unnecessary damage." We incline to think that, by the law as held in Vermont, the act complained of would not

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have been actionable if done by a private individual upon his own land, adjacent to the plaintiff's lot. In that State, no action is maintainable for obstructing or diverting water percolating through the soil (*Chatfield v. Wilson*, 28 *Vt.* 49); and it would not be unreasonable to infer that no action can be maintained there for so changing the level of the soil as to cause mere surface waters to pass into adjacent lots "in greater quantities or in other directions than they were accustomed to flow." See *Angell on Watercourses*, 6 ed. § 108 *a*, *et seq.*, citing authorities not in entire accord with the decisions of our own court in *Swett v. Cutts*, 50 *N. H.* 438, and *Bassett v. Salisbury Manufacturing Co.*, 43 *Id.* 569. Besides the damage caused by surface water, Hatch also claimed to recover on account of the obstruction to his business caused by the embankment in the street, and the running, &c., of trains thereon. The decision against him on that branch of the case is not in point here. So far as that part of Hatch's case was concerned, there was no physical interference with or encroachment upon his land. It did not appear that Hatch owned the fee in any part of the highway. When the case came up a second time (28 *Vt.* 142, 147), BENNETT, J., said, "The case, then, does not call upon us to decide what would have been the rights of Hatch, if any, in case it had been shown that he owned the fee in the land to the center of the highway." The physical consequences of the defendants' acts (apart from the matter of the surface water) did not extend beyond the limits of the highway, within which the plaintiffs had no proprietary interest. It would seem that the legislature had attempted to grant to the corporation the right of crossing the highway, upon the "condition subsequent" of restoring the highway to its former state of usefulness, as near as might be, to the satisfaction of the selectmen or commissioners. As against Hatch, the corporation would appear to have had

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the right to build their track across the highway. Whether even the owner of the fee in the highway could have sued *the town* for building such an embankment, is a question which will be referred to hereafter.

Richardson v. Vermont Central R. R. Co., 25 Vt. 465, is, upon the first point therein decided, an authority in favor of the present plaintiff. The second point decided in that case is similar to the point in *Hatch's* case, which was last discussed. The court expressly said, (p. 462), that it did not appear that the fee in the soil of the highway belonged to the *Richardsons*, and that "the action was evidently not predicated or tried upon any such supposed state of facts." Whatever may be said as to some of the language of the court in these Vermont cases, the actual decisions on the points last named in each case are not necessarily in conflict with the result reached in the present case. Because an act which does not physically affect a lot of land is held not to be a "taking of the owner's property," it does not follow that such a physical injury to land as the present plaintiff complains of is not a "taking." If it should be conceded that no mere personal inconvenience, annoyance, or discomfort to a land owner can amount to a taking of property, and that the legislature may constitutionally authorize the defendants to inflict such annoyance, these concessions do not dispose of the plaintiff's claim. He complains that the physical consequences of the defendants' acts extended beyond their land into his land; that his possession has been disturbed, his premises invaded, and his soil covered with foreign substances. The legislature may authorize a railroad corporation to do some acts, which, but for such authority, would be punishable as nuisances. But it does not follow that the legislative power in this direction is unlimited. On the contrary, the legislature are powerless when they attempt to pass

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"the limits prescribed by the constitution," and one of those limits is reached whenever the proposed act amounts to a taking of private property without compensation.

We come now to a class of cases, many of which might well have been placed under some of the preceding heads. They are what, for want of a better name, may be called "the highway grade cases," viz: unsuccessful actions against municipalities to recover damages alleged to have been sustained by adjacent land owners in consequence of the grading of highways, or the changing of the grade, or the making of other alterations or improvements in highways. If the decisions in some of these cases are necessarily inconsistent with the conclusions reached in this opinion, still there is a large proportion of the cases of which this is not true. We think that many of these cases have been correctly decided, but that the courts have not always put the decision upon the right ground. It is proposed to state briefly the grounds upon which we think that many of these cases might have been disposed of.

When land is taken in the first instance for a highway, the public pay for and acquire "complete control of the soil over which it passes, for all the purposes of its proper enjoyment and maintenance." *Angell on Highways*, 2 ed. § 202. "The rights of the public to the highway, for the legitimate purposes of travel and improving the road, are as perfect and absolute as the rights of a natural person are to his private property in lands." Dissenting opinion of BIRCHARD, J., in *McCombs v. Town Council of Akron*, 15 *Ohio*, 474, 481. If a private land owner lowers the grade of his own lot, and does not thereby cause his neighbor's soil (which has no artificial weight upon it) to break away, "and slide down of its own weight," no action will lie. So, if he raises the grade of his own lot, without placing or causing to be placed any foreign substance upon his

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neighbor's lot, his neighbor has no legal remedy against him. His acts may render the occupation of the neighboring lot less convenient; but he has simply exercised his right to make a reasonable use of his own land, and his neighbor has a corresponding or correlative right to do acts of the same nature on *his* land. In like manner, when a town lower or raise the grade of a street, without thereby undermining or invading, or causing foreign substances to be placed upon the soil of the adjacent owner, or in anyway disturbing such owner's possession, they are only making a reasonable use of their proprietary rights. "No consequences flow from their acts that would have made a natural person liable had he been the owner and performed the same acts." BIRCHARD, J., *ubi supra*, 482. Without touching the adjacent owner's lot, or in any way encroaching upon it, the town "had as clear and perfect authority to raise its street higher or sink it lower than the level of his lot, as he would undoubtedly have had to elevate or sink his ground without touching or otherwise injuring or interfering with the public street." ROBERTSON, Ch. J., in *Keasy v. Louisville*, 4 *Dana*, 154, 155. In such a case there is no encroaching upon the soil of the adjacent owners, "or invading their dominion." "Not a shovel full of earth was taken from it or thrown upon it. There stands their property, within its proper limits, as it stood before." *Per curiam*, in *Henry v. Pittsburgh, &c., Co.* 8 *Watts & Serg.* 85, 86. Towns are "not bound to grade and improve, or pay for grading or improving, the adjacent lots of private persons, so as to make them correspond with the street." SPOFFORD, J., in *Reynolds v. Shreveport*, 13 *La. Ann.* 426, 427. When, then, the acts of the town have been done within the limits of the highway, and do not produce any physical effect or change without those limits, neither taking anything from the soil of the adjacent lots, or superimposing anything upon that

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soil which was not there before, there is no question of constitutional law involved. The town have only made the same reasonable use of their property that every private owner may make of his property. "The rights of the public property are to be governed by the same rules of law as the rights of individuals." HAILE, J., in *Rounds v. Mumford*, 2 R. I. 154, 162. If the soil of the highway was originally taken from the complaining adjacent owners, or from their grantors, they have already been compensated for the damages; for it must be presumed that the possibility of such future changes in the highway was taken into account in the original assessment of damages upon the laying out. If, on the other hand, the highway was built over land taken from another proprietor, the town have done nothing more than that original proprietor might have done with impunity if he had still continued in the exclusive ownership of the land.

Among the cases where we think that the decision may well stand upon the ground of reasonable user of public property, and where, therefore, the result actually reached (*i. e.*, the exemption of the municipality from liability) is not inconsistent with the present decision, are the following: *Humes v. Mayor, &c. of Knoxville*, 1 *Humphrey (Tenn.)* 403; *Rounds v. Mumford*, 2 R. I. 154; *Callender v. Marsh*, 1 *Pick.* 418; *Roberts v. Chicago*, 26 *Ill.* 249; *Macy v. Indianapolis*, 17 *Ind.* 267; *Creal v. Keokuk*, 4 *G. Greene (Iowa)* 47; *Reynolds v. Shreveport*, 13 *La. Ann.* 426; *Hoffman v. St. Louis*, 15 *Mo.* 651; *Benedict v. Goit*, 3 *Barb.* 459; *Simmons v. City of Camden*, 26 *Ark.* 276; *Keasy v. Louisville*, 4 *Dana*, 154. We are also inclined to enumerate, under the same head, *Henry v. Pittsburgh, &c. Co.*, 8 *Watts & Serg.* 85; *Reading v. Keppleman*, 61 *Penn. St.* 233; *Green v. Reading*, 9 *Watts*, 382; *Snyder v. Rockport*, 6 *Ind. (Porter)* 237; *Slatten v. Des Moines Valley R. Co.*, 29 *Iowa*, 148 (where the defendant justified un-

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der a city ordinance; see *COLE*, Ch. J., 156). See, also, in this connection, *EDWARDS*, J., in *Waddell v. Mayor of New York*, 8 *Barb.* 95, 99; *Whittier v. Portland & Kennebec R. R.*, 38 *Me.* 26. We think it quite apparent that *Towle v. Eastern R. R.*, 17 *N. H.* 519 (see, also, 18 *Id.* 547), may well be classed under this head. The defendants acted under the order of the town, and the act directed by the town was one for which a private owner would not have been held answerable. See, also, the remarks of *PARKER*, Ch. J., p. 523, suggesting the further distinction that the act there complained of was not the volutary act of the defendants, done for purposes of their own convenience and benefit.

The Massachusetts decisions, which exempt towns from liability for the flow of surface water from the highway on to premises adjacent to the highway (*Flagg v. Worcester*, 13 *Gray*, 601; *Turner v. Dartmouth*, 13 *Allen*, 291. See, also, *Dickinson v. Worcester*, 7 *Id.* 18), give towns no greater rights or immunities in this respect than individual proprietors have in that State. See *Gannon v. Hargadon*, 10 *Allen*, 106; *Bates v. Smith*, 100 *Mass.* 181. "In this respect," said *MERRICK*, J., 13 *Gray*, 603, "the rights of towns and of the owners of land adjoining a highway are not dissimilar to those of coterminous proprietors of land." And, in *Franklin v. Fisk*, 13 *Allen*, 211, it was held, that while the public may raise the level of their traveled path and thus cause the surface water to flow upon the land of adjacent owner, the adjacent owner may also raise his land to prevent this effect. See, also, *Bangor v. Lansil*, 51 *Me.* 521, 525; *Angell on Watercourses*, 6 ed. §§ 108 l, 108 m. *Hoyt v. City of Hudson*, 27 *Wis.* 656, stands upon the same ground as the Massachusetts cases,—the court holding that a private proprietor could have done what the city did, and that "cities, towns and villages, as the owners of lands for highways and other public purposes, have the same right to ob-

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struct or repel the flow of surface water as other proprietors." DIXON, Ch. J., p. 660. See, in this connection, *Pettigrew v. Village of Evansville*, 25 *Wis.* 223, where the defendants' acts were held unjustifiable. In *Taylor v. St. Louis*, 14 *Mo.* 20, an alley had been dedicated to the public by the plaintiffs or their ancestors; and NAPTON, J., said that the probability of its being graded when the public interest required it, must have been calculated on when the buildings were erected.

We do not assert that *all* the "highway grade cases," where municipalities have been exempted from liability, could have been decided on the foregoing ground of reasonable user of public property. But a considerable proportion of the remaining cases of this class are very near the border line in this respect; and, without a fuller statement of fact, or a perfect knowledge of the law in each jurisdiction relative to the construction given to the right of reasonable user on the part of individual proprietors (particularly in reference to surface water), it is difficult to determine on which side of the line some of the cases belong. We do not feel certain that the following cases could not have been decided on the above ground of reasonable user. *O'Connor v. Pittsburgh*, 18 *Penn. St.* 187; *Rome v. Omberg*, 28 *Ga.* 46 (see LUMPKIN, J., pp. 47, 49); *Roll v. Augusta*, 34 *Ga.* 326; *St. Louis v. Gurno*, 12 *Mo.* 414; *White v. Corporation of Yazoo City*, 27 *Miss.* 357; *Clark v. City of Wilmington*, 5 *Harr. (Del.)* 243, 244; *Wilson v. Mayor of New York*, 1 *Denio*, 595. See, also, *Carr v. Northern Liberties*, 35 *Penn. St.* 324; *Angell on Watercourses*, 6 ed. §§ 103 l, 108 m. In the oft-quoted case of *Radcliff v. Mayor of Brooklyn*, 4 *N. Y. (4 Comst.)* 195, some of the views of BRONSON, J., are in direct conflict with the present decision (see *Id.* 197, 198, 203-208); but no less than five pages of the opinion are occupied in attempting to establish the

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position that the corporation of Brooklyn had done nothing more than a private owner might lawfully have done in the exercise of the same proprietary rights. If this last position does not accord with the current of authority, still the fact that it was the opinion entertained by BRONSON, J., in that case, may have induced a less careful consideration by that eminent judge of the other grounds of the decision, which were wholly unnecessary if the above position was well taken.

The case of *Benden v. Nashua*, 17 *N. H.* 477, was decided in 1845, but the volume of reports in which it is contained was not published until 1864. In 1855, SAWYER, J., in delivering the opinion in *Ball v. Winchester*, 32 *N. H.* 435, 441, undertook to state the questions which had been raised and decided in *Benden v. Nashua*. As SAWYER, J., was, in 1845, a member of the bar, residing in Nashua (or Nashville), it is quite probable that he heard the court announce the decision in *Benden v. Nashua*; and we think that his recollection, ten years afterwards, of the grounds of the decision as then stated by the court, may have been as accurate as the recollection of PARKER, Ch. J., after nearly double that space of time. In *Ball v. Winchester*, SAWYER, J., says, pp. 441, 442, that the injuries complained of in *Benden v. Nashua* were occasioned "by causing the rain-water to flow into the house, and also by creating an embankment immediately in front of it;" and that "in the reasoning of the court upon the case, the decision was placed upon the ground that the town could not be held answerable for the acts of the surveyor; and, also, upon the ground that for such consequential damages as might result to the owner of the adjoining land from the improvements which the public accommodation required to be made in the highways, the compensation must be presumed to have been made in the award of damages for the land taken for the highway." If the foregoing is a correct state-

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ment of the grounds of that decision, they are not necessarily inconsistent with the present conclusion. If, on the other hand, the reported opinion in 17 *N. H.* correctly indicates the views then taken by the court, it nevertheless admits of question whether the case could not have been decided upon the ground of reasonable user. As the law is now settled by the decision in *Swett v. Cutts*, 50 *N. H.* 439, the question of reasonable user as to the flow of surface water might be for the jury. *Ball v. Winchester*, 32 *Id.* 435, is not in point. In that case, the court held that the acts of the surveyor were not the acts of the town, and that the town were not liable to the plaintiff for neglect to perform the duty of keeping the highway in repair.

Without reviewing all the cases on this topic (see *Smith v. Washington*, 20 *How.* 135; *Lafayette v. Spencer*, 14 *Ind.* 399; *Vincennes v. Richards*, 23 *Id.* 381; *Plum v. Morris Canal & Banking Co.*, 2 *Stockton Ch. (N. J.)* 256; and other cases collected in *Dillon on Municipal Corporations*, § 784, note 1), it is quite clear to our minds that the judgments rendered in a very considerable proportion of them are not necessarily irreconcilable with our conclusions in the case at bar.

So far as the decisions in any of the "highway grade cases" are absolutely inconsistent with the present opinion, we are not disposed to acquiesce in them, nor to decide this case upon their authority. That authority has been somewhat weakened by the dissatisfaction expressed by some judges at the harshness and injustice of the decisions which they have felt compelled to make (see *O'Connor v. Pittsburgh*, 18 *Penn. St.* 187; *WOODWARD, J.*, in *Re Ridge-street*, 29 *Id.* 391, 395; *KINNEY, J.*, in 4 *G. Greene (Iowa)* 47, 52); also, by the fact that the manifest hardship thus engendered has led, in more than one instance, to legislative enactments for the protection of adjacent land owners (see, in our own State, the statute of 1848, chap. 725, prob-

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ably passed in consequence of the decision in *Benden v. Nashua*, *ubi supra*). If these decisions were intrinsically correct, it might be desirable to consider further the question already adverted to, whether the position of these defendants is analogous to that of a municipal corporation. But we think that decisions, which go to the length of exempting municipalities from liability for the infliction of injuries like the present, are erroneous in principle. If, in the repair of highways, there is a physical interference with land outside the limits of the highway, a substantial taking away of the soil of the adjacent owner, or an imposition of foreign substances upon it so as to amount to a substantial abridgment of his right of exclusive user, the mere fact that the injury is done by a town or city ought not to deprive the land owner of all redress. The opposite view "places individual property . . . at the mercy of municipal power." "We can solve more easily and safely questions of this character, if we take pains to free our minds from a false notion that a municipality has some indefinable element of sovereign power, which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person." The same constitutional provision that protects the right of private property against invasion by private individuals, "must protect it from similar aggression on the part of municipal corporations." LAWRENCE, J., in *Nevins v. City of Peoria*, 41 *Ill.* 502, 508, 509, 510. "It is said that the city must grade streets and direct the flow of waters as best it can for the interests of the public. Undoubtedly; but if the public interest requires that the lot of an individual shall be rendered unfit for occupancy, either wholly or in part," by placing something on the soil, or by taking from the soil, "in this process of grading or drainage, why should not the public pay for it, to the extent to which it" thus "deprives the owner of its legitimate

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use. Why does not the constitutional provision apply as well to secure the payment for property partially taken for the use or convenience of a street, as when wholly taken and converted into a street? Surely the question of the degree to which the property is taken can make no difference in the application of the principle. To the extent to which the owner is "thus substantially "deprived of its legitimate use, . . . to that extent he should be paid." LAWRENCE, J., *ubi supra*, p. 511. The intrinsic correctness of the views just expressed is strongly maintained by the reasoning of Mr. Angell in his work on Highways, 2 ed. § 211. It is also supported, in some degree, by the last paragraph in section 799 of *Dillon on Municipal Corporations*, and by the decision in *Pettigrew v. Village of Evansville*, 25 Wis. 223. See, also (besides *Nevins v. Peoria*, *ubi supra*), *Louisville v. Rolling Mill Co.*, 3 Bush (Ky.) 416; *McCord v. High*, 25 Iowa, 336, BECK, J., p. 342; DILLON, Ch. J., p. 350; dissenting opinion of BIRCH, J., in *St. Louis v. Gurno*, 12 Mo. 414, 424. There are also cases in Ohio, cited in *Dillon on Municipal Corporations*, § 783, note 1, some of which would seem to impose a greater degree of liability on municipal corporations than it is necessary for the plaintiff in this case to contend for as against a railroad corporation. See, also, 2 *Kent Com.* 414, note *b*.

No one can read these "highway grade cases" without perceiving how much American courts have relied upon the English authorities as establishing the position that the formal enactment of a statute purporting to authorize the doing of an act always affords a complete justification to the doer. The fallacy of assuming that our State legislatures possess the practically omnipotent powers of the British parliament, or that they pass none but constitutional statutes, has already been exposed. It is, however, worth remark, that the English case most frequently cited in these

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American decisions (*Gov. & Co. of the British Cast Plate Manufacturers v. Meredith*, 4 *Term R.* 794), was one which, it seems to us, might well have been decided on the ground that the paving commissioners had simply made the same reasonable use of public property that an individual might lawfully have made of his private property ; that they had done nothing more in the street than a private individual might do with impunity upon his own land.

By the foregoing review of authorities, it appears that the number of actual decisions in irreconcilable conflict with the present opinion is much smaller than has sometimes been supposed, and that in a large proportion of the cases cited, the application of the principles here maintained would not have necessitated the rendition of a different judgment from that which the courts actually rendered in those cases.

Thus far Eaton's case alone has been under consideration. The only difference between Eaton's case and Aiken's case arises from the fact that a small part of the ridge is included in Aiken's farm, while none of it is on the farm of Eaton. This difference does not affect the present inquiry, which relates solely to the correctness of the ruling at the trial. The court did not rule that Aiken could recover the damages occasioned to him by the entire cut through the ridge. The ruling was carefully limited to "such damages as have been caused" the plaintiffs "in consequence of the defendant's cutting away the ridge north of the plaintiffs' farms. If any damage was caused to Aiken by the defendants' removing any portion of that "small part" of the ridge which was included in his farm, he is not entitled to recover for it under this ruling. So far, then, as the correctness of the ruling is concerned, Aiken's case stands on the same legal principle as Eaton's. Under this ruling it will be for a jury to say how much of the injury to Aiken's meadow was occa-

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sioned by the removal of that part of the ridge which was north of Aiken's farm.

In both cases the exception is overruled. As the defendants elect trial by jury, the order must be,—

Case discharged.

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23 *Michigan*, 499.

Railroad aid by towns and counties.—Taxation.—Bonds. The municipal corporations of this State have no authority in return for, or upon the basis of, the incidental benefits anticipated, to exercise the power of taxation in aid of private corporations building, or proposing to build, railroads to be owned and controlled by their corporators; and bonds issued by way of such aid, being incipient steps leading to taxation, are unauthorized.

The taxing power of the State has certain definite limits, one of which is that the tax must be for a public purpose; and within the meaning of these words as employed to measure the authority of the State to demand and enforce the contributions of its citizens, a railroad in the hands of a private corporation, is no more a public purpose than a manufactory, a newspaper establishment, or any other means for the carrying on by individuals of a business which, while private in its nature, nevertheless supplies a public need.

The legislature therefore, can neither compel the taxation of municipalities in aid of railroad companies, nor empower them, in order to give such aid, to tax themselves or to contract indebtedness which must be paid by taxation. *People v. Salem*, 20 *Mich.* 452.

Due process of law. To take a man's property from him, under pretense of taxation, for a purpose for which taxation is not admissible, is an unlawful confiscation and not due process of law; and is therefore forbidden by Art. VI. § 32, of our constitution.

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Municipal votes. The power to impose such taxation could not come from, nor be aided by, the municipal votes. The legislature has exactly the same power to impose the taxation without the assent of the municipalities, that it has to permit it with their assent; and the permission granted to the municipalities to vote upon the question was matter of favor and not of right.

Apportionment of the burden of taxation. There is no mode in which aid to a railway running through many municipalities can be given by the taxation of all, consistently with any recognized theory of taxation, without an apportionment of the burden by some rule, or upon some basis, among them all; and this would be impossible under a system by which one township might tax itself ten per cent. of its valuation, another equally benefited by the same object refuse to pay but one, and the third decline altogether to bear any share of the common burden.

Constitutional construction. The State is precluded from loaning the public credit to private corporations, and from imposing taxation upon its citizens or any portion thereof in aid of the construction of railroads, by Art. XIV. §§ 7, 8 and 9, of our constitution. What the State cannot do in this regard directly, it cannot require its townships, cities and villages do for it.

Constitutions are to be construed as the people construed them in their adoption, if possible; and the public history of the times should be consulted, and should have weight in arriving at that construction.

Mandamus. When a municipality, under our railroad aid law (*Sess. L. 1869, 89*), has issued and deposited bonds in aid of a railroad with the State treasurer, who, on demand therefor, has declined to deliver the same to the proper authorities of such municipality a writ of mandamus will be granted to compel such delivery.

Practice in supreme court.—Costs. Where, in such case, there is nothing to indicate that the State treasurer, in awaiting the order of the court before delivering up the bonds as requested, was not acting in good faith under an honest misapprehension of his duty, the writ will issue without costs.

Application for mandamus.

The opinion contains a full statement of the case.

J. W. McMath, for the relator.

Dwight May, attorney general, and *George V. N. Lothrop*, for the respondent.

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COOLEY, J.—This is an application for a mandamus to require the respondent to deliver to the proper authorities of Bay City certain bonds which, under the provisions of an act entitled “An act to enable any township, city or village to pledge its aid, by loan or donation, to any railroad company now chartered or organized under, and by virtue of, the laws of the State of Michigan, in the construction of its road,” approved March 22, 1868 (*Sess. L.* 1869, 89), had been issued and deposited in the respondent’s office in aid of the Jackson, Lansing & Saginaw Railroad Company. The act in question undertook to empower any such township or city to pledge its aid to any railroad company chartered or organized, or that might thereafter be organized, under the laws of the State, in the construction of the road of such company, by way of loan or donation, for such sum or sums, not exceeding ten per centum of the assessed valuation then last made, of the real and personal property of such township or city, as a majority of the electors should, at a meeting called for the purpose, determine; but with certain provisos which we need not here recite. Any township or city availing itself of the provisions of the act by voting aid to any railroad company was to issue coupon bonds for the amount of aid granted, which were to be deposited in the office of the treasurer of the State, and by him delivered to such railroad company on a certificate from the governor, showing that the company under the act had become entitled thereto. And the bonds so issued were to be paid as they fell due, from taxes levied upon the taxable property of the municipality issuing the same. The provisions of the act were also extended to incorporated villages.

Under this act, it appears that Bay City voted aid to the Jackson, Lansing & Saginaw Railroad Company to the amount of one hundred thousand dollars, and issued and deposited its coupon bonds with the State

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treasurer therefor. We are not advised whether the aid to this extent was to be by way of donation or loan, nor do we regard it as material. The city now desires the return of the bonds, and has made demand therefor upon the treasurer, who has declined to comply therewith.

In *People v. Township Board of Salem*, 20 *Mich.* 452, this court decided that the municipal corporations of this State had no authority in return for, or upon the basis of, the incidental benefits anticipated, to exercise the power of taxation in aid of private corporations building, or proposing to build, railroads to be owned and controlled by their corporations; and that bonds issued by way of such aid, being incipient steps leading to taxation, were therefore unauthorized. We held, moreover, that the taxing power of the State had certain definite limits, one of which was that the tax must be for a public purpose; and that within the meaning of these words as employed to measure the authority of the State to demand and enforce the contributions of its citizens, a railroad in the hands of a private corporation was no more a public purpose than a manufactory, a newspaper establishment, or any other means for the carrying on by individuals of a business which, while private in its nature, nevertheless supplied a public need. Our conclusion, therefore, was, that the legislature could neither compel the taxation of municipalities in aid of railroad companies, nor could it empower them, in order to give such aid, to tax themselves, or to contract indebtedness which must be paid by taxation.

The case mentioned was argued with signal ability, and no legal controversy ever passed upon by the judicial tribunals of the State received a more patient and deliberative hearing or examination. The conclusion reached by the majority of the court, was one which struck at the root of all the legislation of which the

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act in question was an instance. We found no warrant for it in the constitution. On the contrary, we found that it assumed to take from the citizen his property under a pretense of taxation, but in a case and for a purpose not admitting of an exercise of that power. Our constitution has carefully provided a shield against an invasion of the citizen's right to his property, in the provision which guarantees to every person due process of law. Art. VI. § 32. To take a man's property from him under pretense of taxation, for a purpose for which taxation is not admissible, is not due process of law, but is an unlawful confiscation.

The State treasurer, we have no doubt, is acting in good faith in awaiting the order of this court before delivering up the bonds as requested. We assume that he desires the advice of the court as to his duty in the premises, and that it is not his purpose or desire to cause unnecessary trouble, litigation or expense to the municipal authorities. By way of giving such advice, and in order to render any future application of this character unnecessary, we repeat at this time the main point of our previous decision. We based our judgment upon a ground that we thought could not be misunderstood, and the scope of which could be perfectly comprehended. All our reasoning went to show that when the property of the individual was taken by the State, under the forms of taxation, for the use of a private corporation, and for no other return than the expected incidental benefits, it was in effect taken for a private use, and without compensation.

Another fatal objection to all this legislation, upon which the majority of the court were then agreed, was not fully developed, though referred to when our judgment was declared. As we then stated, the power to impose such taxation, if existing at all, could not come from, and was not aided by, the municipal votes. The legislature would have exactly the same power to im-

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pose the taxation without the assent of the municipalities, that it would have to permit it with their assent. If they were allowed to vote upon the question, the permission would be of favor and not of right. The authority must come from the plenary power of the legislature over the whole subject of taxation, which it would exercise upon the municipalities in its discretion. It might seem fairer to the people concerned to permit them to vote upon the question, but in some particulars the very permission would work an injustice. For it needs no argument to show that if a railroad through many municipalities is a public object which may be aided by the taxation of all, there is no mode in which the aid can be given consistent with any recognized theory of taxation without an apportionment of the burden by some rule or upon some basis among them all. This might be done if the legislature prescribed the tax, but it would be impossible under a system under which one township might tax itself ten per cent. of its valuation, another equally benefited by the same object refuse to pay but one, and a third decline altogether to bear any share of the common burden. The result of legislation like this would be, that the legislature would be requiring these several municipalities to tax themselves for an object common to them all, but without even the pretense of an apportionment of the burden. But we did not find our constitution silent on the subject of such taxation. Our State had once before had a bitter experience of the evils of the government connecting itself with works of internal improvement. In a time of inflation and imagined prosperity, the State had contracted a large debt for the construction of a system of railroads, and the people were oppressed with heavy taxation in consequence. Moreover, for a portion of this debt they had not received what they had bargained for, and they did not recognize their legal or moral obligation

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to pay it. The good name and fame of the State suffered in consequence. The result of it all was that a settled conviction fastened itself upon the minds of our people, that works of internal improvement should be private enterprises; that it was not within the proper province of government to connect itself with their construction or management, and that an imperative State policy demanded that no more burdens should be imposed upon the people by State authority for any such purpose. Under this conviction they incorporated in the constitution of 1850, under the significant title of "Finance and Taxation," several provisions expressly prohibiting the State from being a party to, or interested in, any work of internal improvement, or engaged in carrying on any such work, except in the expenditure of grants made to it; and also from subscribing to, or being interested in the stock of any company, association or corporation, or loaning its credit in aid of any person, association or corporation. Art. XIV. §§ 9, 8 and 7.

All these provisions were incorporated by the people in the constitution as precautions against injudicious action by themselves, if in another time of inflation and excitement they should be tempted to incur the like burdensome taxation in order to accomplish public improvements in cases where they were not content to wait the result of private enterprise. The people meant to erect such effectual barriers that if the temptation should return, the means of inflicting the like injury upon the credit, reputation and prosperity of the State should not be within the reach of the authorities. They believed these clauses of the constitution accomplished this purpose perfectly; and none of its provisions had more influence in recommending that instrument to the hearty good will of the people.

In process of time, however, a majority in the legislature were found willing, against the solemn warning

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of the executive, to resort again to the power of taxation in aid of internal improvement. It was discovered that though "the State" was expressly inhibited from giving such aid in any form, except in the disposition of grants made to it, the subdivisions of which the State was composed were not under the like ban. Decisions in other States were supposed to sanction the doctrine that, under such circumstances, the State might do indirectly through its subdivisions what directly it was forbidden to do. Thus a way was opened by which the whole purpose of the constitutional provisions quoted might be defeated. The State could not aid a private corporation with its credit, but it might require each of its townships, cities and villages to do so. The State could not load down its people with taxes for the construction of a public improvement, but it might compel the municipal authorities, which were its mere creatures, and which held their whole authority and their whole life at its will, to enforce such taxes, one by one, until the whole people were bent to the burden.

Now, whatever might be the just and proper construction of similar provisions in the constitutions of States whose history has not been the same with our own, the majority of this court thought when the previous case was before us, and they still think, that these provisions in our constitution do preclude the State from loaning the public credit to private corporations, and from imposing taxation upon its citizens, or any portion thereof, in aid of the construction of railroads. So the people supposed when the constitution was adopted. Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad

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general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions when practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power. In these cases we thought we could arrive at it from the public history of the times.

The writ of mandamus will issue as prayed, but, in this instance, without costs, there being, probably, an honest misapprehension on the part of the treasurer as to his duty.

CAMPBELL, Ch. J., and CHRISTIANCY, J., concurred.

GRAVES, J.—I do not deem it necessary to rediscuss the question examined in the Salem case, and I, therefore, refrain from going into it. In the present instance I think the showing sufficient, in view of the decision then made, to warrant the order prayed for, and I accordingly concur in so holding.

HOUSTON v. PEOPLE *ex rel.* THE PEORIA &
ROCK ISLAND RAILWAY COMPANY

(55 Illinois 398.)

Ministerial officers—not to decide whether they shall act.—Counter-signing bonds by a town clerk. Where bonds issued by a township on a subscription to the stock of a railroad company, are required by law to be countersigned by the town clerk before being delivered, such act of countersigning is a mere ministerial

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act, and it is not the province of such clerk, when called upon to do the act, to determine whether the proper steps have been taken to authorize the issuance of the bonds.

So upon an application for a mandamus to compel a town clerk to countersign such bonds, which had been executed by the town supervisor, it was *Held*, the clerk could not set up matters affecting the legality of the steps required by law to be taken before the bonds could properly issue, as a reason for refusing to countersign them. The law provides another mode for determining such a question.

Appeal from the circuit court of Woodford county.

This was an application made to the circuit court of Peoria county, in the name of the people, on the relation of the Peoria & Rock Island Railway Company, for a writ of mandamus against Henry C. Houston, town clerk of the town of Akron, in Peoria county, to compel such clerk to countersign certain bonds of the township, which had been executed by the town supervisor, and to which the relators claimed they were entitled.

The proceeding was removed, on change of venue, into the circuit court of Woodford county.

The alternative writ set out that the relators were an incorporated company, engaged in building a railroad from Peoria to Rock Island, and that their line runs through said town of Akron. The relators allege that under the charter of said company, the question was submitted to the voters of said town, whether the town, in its corporate capacity, should subscribe for three hundred shares of one hundred dollars each, amounting in the aggregate to thirty thousand dollars, to the capital stock of said company; that at an election held for that purpose, a majority of the votes cast at such election were "for subscription." It is alleged that all the various steps required by law to render the subscription legal, were taken, and the subscription made; that afterwards the town was called upon, together

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with other subscribers, to make payment of ten per cent upon its subscription, making the amount due thereon from the town three thousand dollars, payable in the bonds of the township, and the supervisor of the town executed bonds to the relators for that amount. The relators further alleged that said supervisor thereupon presented the bonds to the respondent, as township clerk, to be by him attested, as required by law, but that he refused to attest the same.

The respondent, as his reason for refusing to attest or countersign such bonds, set out his objections to the regularity and sufficiency of the various steps required by law to be taken, to authorize their issuance.

A demurrer to the return was sustained, and the respondent abiding by his return, a peremptory writ was awarded.

The respondent thereupon took this appeal.

Messrs. Burns & Barnes, and *Messrs. Wead & Jack,* for the appellant.

Messrs. Bryan & Cochran, for the appellees.

BY THE COURT.—MCALLISTER, J.—The appellant being town clerk, the act of countersigning the bonds in question was a mere ministerial act. It was not the province of such clerk to determine whether the proper steps had been taken to authorize the issuance of the bonds. If valid reasons existed why they should not be issued, the law provides a mode in which that question could be properly determined. *People v. Dean*, 3 *Wend.* 438. The judgment of the court below must be affirmed.

Judgment affirmed.

Mr. JUSTICE SCOTT took no part in the decision of this case.

THE MOBILE & OHIO RAILROAD COMPANY v.
WISDOM.5 *Heiskell (Tenn.) Rep.*

Railroad tax receipts.—Legal title, how conveyed. Section 8 of an act of the legislature of Tennessee, of 1852, authorizing and regulating the subscription of counties for the stock of railroads, and providing for the collection of taxes to defray the subscription,—provides that the collector receiving such taxes shall issue a receipt which may be assigned, transferred, or traded, and be receivable for freight or passage over the road on which taxes so collected are expended. On a petition for mandamus to compel the defendant company to receive several of these certificates for passage of the holder over a position of its route,—*Held*, that the legal title and rights of such tax receipts may be as well transferred by delivery simply as by indorsement or assignment in writing.

Liability of railroad company accepting such subscription. When a company has accepted subscriptions of counties under provisions of the law of 1852, received the taxes and issued tax receipts as required by section 8 of said act, it will not be permitted afterwards to deny its duty to accept the payment for freight or passage on the ground that it was organized, and its duties are defined by an act earlier than that of 1852. It has rendered itself subject to the conditions of this statute, by taking advantage of its benefits.

Mandamus, when issued. Whenever there is a right which has been illegally and unjustly withheld, and there is no other specific adequate remedy, the writ of mandamus will be issued; and private persons as well as the public are entitled to its benefits.

Same. When a railroad company received subscription taxes, and issued receipts therefor, under a statute specifically providing that the receipts should be receivable by the company for freight or passage,—*Held*, in the absence of other objections, that a writ of mandamus should issue to compel the company so to receive them, and that the right of the holder to sustain an action on the case against the company for its refusal to receive the certificates does not furnish him with such adequate remedy as to bar proceedings by mandamus.

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Error.

Case fully stated in the opinion.

NICHOLSON, Ch. J.—This is a proceeding by mandamus, to compel the Mobile & Ohio Railroad Company to receive in payment for freight or passage on their road certain tax receipts given by the tax collector of Madison county, Tenn., and countersigned by the county court clerk of said county.

The petition was filed on January 2, 1869; and exhibits three tax receipts, amounting in all to about twenty-four dollars, none of which were issued to petitioner, nor assigned to him by indorsement. He alleges that he is the holder of the receipts by delivery, and that he tendered the same in payment for a ticket from Jackson to Mobile, but that the agent of the railroad company refused to receive them in payment for said ticket.

An alternative mandamus issued, requiring the company to appear and show cause why the alternative mandamus should not be made absolute. The company appeared and moved to quash the writ, and assigned various reasons why the motion should be sustained. The circuit judge determined that the reasons were insufficient, and overruled the motion; and thereupon, gave judgment, making the mandamus absolute. From this judgment the company appealed in error to this court.

We deem it unnecessary to notice in detail the several objections taken to the petition, for want of sufficient clearness and definiteness in its several allegations, as these objections are merely technical, not reaching the merits of the case, and as the petition, if insufficient as to matters of mere form, is amendable. But we are satisfied that there is no substantial defect in the averments of the petition, and will proceed to examine the objections which reach the merits of the case.

1. It is said that to entitle the petitioner to the benefit of the writ of mandamus, he must show that he has a clear legal and equitable right to something, which is properly the subject of the writ; but that petitioner shows, by exhibits to his petition, that the tax receipts have never been assigned to him in writing, and therefore, that he has not the legal title. It is true, that the tax receipts exhibited were not issued to the petitioner, nor do they appear to have been assigned to him by written indorsements, from the original parties, to whom they were issued. Whether he has the legal title, therefore, must depend upon the proper construction of the law which authorized their issuance.

The receipts were issued in pursuance of section 1 of the act of 1852, p. 161, entitled "An act to authorize and regulate county subscription for railroad stock." After providing the mode by which counties could subscribe for stock, and for the manner of holding elections, by the people of the counties, to determine whether the stock should be subscribed, and defining the mode of levying taxes to meet the subscription, and of collecting the same, the act in section 8 contains this provision :

"As the said railroad collector shall receive the tax, he shall give the person paying a certificate, showing the amount, which certificate may be traded, assigned, or transferred, and shall be receivable in payment of either freight or passage, on any road on which such subscription may have been expended."

It is argued, that in providing that the certificates might be "traded, transferred or assigned," the legislature intended to make them negotiable by written indorsement only. We are aware of no rule of interpretation which requires such construction to be placed on the words. Neither in their technical nor in their ordinary use, do they necessarily imply that the act to be accomplished is to be evidenced by writing. *Burrill*

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on *Assignments*, p. 3, note, says: "The term assignment is frequently used in the books to express the transfer of a promissory note by delivery." He gives a number of cases to illustrate the remark. But, if we look to the object of the legislature, for making the receipts negotiable, we cannot doubt that it was intended to make them easily transferable, by way of being used as a kind of local currency. This object would be best accomplished by authorizing their transfer or assignment, either by mere delivery or by writing, and such we think is the proper import of the words in the connection in which they are used. This objection, therefore, is not well taken.

2. It is next said, that the Mobile & Ohio Railroad Company was organized in 1848; that the act authorizing the county subscriptions was passed in 1852; and that the earliest date of these certificates exhibited in the petition is 1854; and it is argued, that it is not shown when, how, or where said company became a party to the Madison county subscription, or became liable to pay said tax certificates. And it is added, that the general internal improvement law, passed January 22, 1852, contains this provision: "That no company shall be required, under the provisions of this act, to do anything inconsistent with the provisions of its charter, or in violation of existing laws."

By reference to the petition we find this averment: "That said railroad tax was collected and paid over to said railroad company, and tax certificates given to the taxpayers, in due form of law, for the amount of railroad tax paid by each taxpayer; and he is advised and charges, said Mobile & Ohio Railroad Company having applied for and accepted said subscription, took upon itself the statutory obligations to receive said tax certificates in payment for freight and passage." The motion to quash admits the truth of these allegations. If the railroad company applied for the subscription of

two hundred and fifty thousand dollars, in accordance with the statute, and actually received and appropriated the money so applied for and raised, they consented thereby to the terms on which the tax was collected and paid over, and the company is now estopped from denying the statutory obligations imposed upon them. This would be so, even if the original charter of the company contained no provision authorizing them to receive county subscriptions of stock. The subsequent act of the legislature in 1852, authorizing the subscriptions by counties, passed on January 22, 1852, having been accepted by the company, to the extent of receiving subscriptions for stock by Madison county, they thereby, to that extent, adopted that act as part of their charter, and in consequence, were guilty of no violation of their charter in accepting said subscription, and are effectually estopped from now repudiating their obligations so assumed.

This objection, therefore, is not well taken.

3. It is next said that the writ of mandamus is not a writ of right, and is not granted as a matter of course,—that it only lies where the law has established no specific remedy—nor where satisfaction equivalent to a specific remedy can be had. Hence, it is inferred, that as the petitioner might have had his action on the case for damages, therefore, he cannot have the writ of mandamus. This argument assumes that the action on the case furnishes an equivalent satisfaction to a specific execution of the obligation. That is assuming the very question at issue. The petitioner has a right, as he alleges, to buy a railroad ticket to Mobile, and to pay for it with his tax receipt. The company say, true, we are bound to receive your tax receipt for a ticket, but we choose to require you to pay the money, and you can sue us for damages for violating our contract; when you get your money, that will be equivalent to your tax receipt, and you can then buy a ticket

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to Mobile. It is far from being clear, that the remedy by action for damages would be equivalent to a specific execution of the obligation. It might be that a judgment against the company would not be readily convertible into money.

It is a general rule, that, whenever a statute gives power to, or imposes an obligation on a particular person, to do some act or duty, and provides no specific remedy on non-performance, a mandamus will be granted. *Tapping on Mandamus*, 80; *Winters v. Bersford*, 6 *Cald.* 330. *Moses on Mandamus*, p. 14, lays down this as the rule:

"It will, therefore, be observed, that it is one of the remedies resorted to, when a person desires to be placed in possession of a right, illegally and unjustly withheld from him. It does not award damages as a compensation for an injury, but it seeks to give the thing itself, the withholding of which constitutes the injury complained of." And he adds: "The office of the writ of mandamus is very extensive. It has been said, that 'it is the supplementary remedy when all others fail.'"

Again, at p. 18, he says: That although the power to issue the writ in America is not regarded as a prerogative power, yet it so far partakes of the nature of a prerogative writ, that the court has the power to issue or withhold it, according to its discretion. But this discretion is not an arbitrary one; it is a judicial discretion; and when there is a right, and the law has established no specific remedy, the writ should not be denied." 7 *Curley*, 226; *Ang. & A. on Corp.* §§ 699-710. 2 *Redfield on Railways*, p. 279, says: "No better rule can be laid down than that where the charter of a corporation, or the general statute in force, and applicable to the subject, imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no other specific or

adequate remedy, the writ of mandamus will be awarded."

We deem it useless to cite other authorities to the effect, that whenever there is a right which has been illegally and unjustly withheld, and there is no other specific adequate remedy, the writ will be issued, and private persons, as well as the public, are entitled to its benefit. *Winters v. Bersford*, 6 *Cald.* 328; *Ang. & A. on Corp.* §§ 704-707.

In the case before us, the legal right is clear; the obligation created by the general statute, and the acceptance of its provisions and benefits by the company is obvious, and the withholding of the right is illegal and unjust. It is equally obvious, that there is no specific adequate remedy provided by the law which created the right and the obligation.

It appears by reference to the act of 1852, that its leading object was to give assistance to the railroads then struggling into existence, by authorizing the people of counties to subscribe for stock, and to pay the same by imposing taxes on themselves. This assistance was sought for and accepted by the company, not so much to swell the number of their subscribers for stock, as to procure the material aid to be furnished by taxation. To secure this object, the Mobile & Ohio Railroad Company not only agreed that the counties so furnishing aid should be represented in the company, but that every individual who should buy up one hundred dollars of the tax receipts, should become a stockholder, and in addition to this, that any holder of the tax receipts, who preferred to invest his tax receipts in freight or passage on the road, should have the right to do so. The acceptance of the assistance from the county of Madison imposed all of these obligations on the united corporation, represented by its officers. Each of these obligations is equally binding on the corporation, and after having accepted the taxes and used them for the

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common benefit in building the road, they cannot now repudiate any one of the obligations thus assumed.

4. It is next objected, that the writ in this case is sued out, not so much to have the right of petitioner enforced as to three tax receipts exhibited in his petition, as to test the question, with the view of having a decision that will be applicable to many other like receipts. We are unable to appreciate the force of this objection. As far as we are able to see, the petitioner has sued out the writ in good faith, to have his rights, in the specific case presented, determined. It can surely be no reason for our withholding from him his rights, that he or others may have other similar rights that may be settled by this adjudication. It is our duty to determine questions brought regularly before us, according to law, and to leave the consequences of our decision on other cases to have their legitimate weight.

5. It is next objected, that the right now sought to be enforced has been so long deferred, that it has become stale; and, therefore, that it is entitled to no favor. It does appear that all the receipts exhibited were dated in 1854, and that the petition was not filed until January, 1869, a period of fourteen years. It further appears, that the holders of the receipts were not authorized to use them, in payment of freight or passage, until one year after the road was completed. But it does not appear at what time the road was completed. The facts, therefore, do not authorize us to assume that the assertion of his right by petitioner has been unreasonably delayed; nor do we well see, how the railroad company can complain of the delay. The petitioner has held a *bona fide* debt against the company for fourteen years, bearing no interest, and now, after having waited that length of time, and lost his interest all the time, and although the company has had the use of his money all that time without interest, he is sought to be repelled, on the ground that he has been so indul-

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gent to his debtor, that his claim has become stale. We are unable to appreciate the force of this objection.

It results that we find no error in the action of the circuit judge in refusing to quash the writ and petition, and we affirm his judgment for a peremptory mandamus.

RICHARDSON v. THE VERMONT & MASSACHUSETTS RAILROAD COMPANY

44 Vermont, 613.

Corporation. A railroad corporation has authority to stipulate that each stockholder shall be entitled to interest on sums paid on stock subscriptions while its road is in process of construction, until it is completed and goes into operation, payable whenever the surplus earnings shall enable it properly to do so.

This arrangement for the payment of "interest dividends" is equitable and just; and such payment, made only out of the surplus earnings not needed for the payment of debts of the corporation or for the prosecution of its business, does not interfere with the rights of creditors nor contravene any principle of public policy.

Meeting of stockholders. The vote to pay such interest was passed at an annual meeting of the stockholders, the subject not being specially named in the notice calling the meeting. *Held*, without deciding whether the corporation had the right to pass such vote, that the defect, if any, could be secured by subsequent ratification.

The subsequent action of the corporation in paying the interest to stockholders in pursuance of said vote, and the corporation and directors subsequently voting to issue certificates for the payment of said interest, and the action of the treasurer in issuing such certificates, constitute a ratification of such vote.

One of the by-laws of the defendant corporation provides that "at the annual meetings any matter may be acted upon within the power of the corporation." *Held*, therefore, that the proceedings of the corporation, terminating in the issuing of the interest certificates,

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created an obligation upon the corporation to pay according to the terms and conditions of such certificates.

Interest. Notwithstanding the stock for which seventy-five dollars and fifty dollars per share were paid was to be of equal rank and value as the other stock for which one hundred dollars per share was paid, yet in the matter of this interest such stockholders should be limited to "*interest on all amounts paid by them,*" according to the language of the original vote, and are not entitled to interest upon the nominal value of one hundred dollars per share, and the certificates should be reduced accordingly.

Chancery. There is not such a clear, complete and adequate remedy at law in this case as to require or justify the denial of relief in a court of equity on the ground that the remedy must be at law.

The ability of the corporation to pay, which constitutes the contingency upon which these certificates are payable, must be ascertained in reference to the nature of the subject and the relative condition of the parties, and their duty to creditors having a paramount right.

The mere fact of the corporation having funds in its treasury sufficient in amount to pay the orators, would not be sufficient to show the ability of the corporation contemplated in the vote and certificates. That ability must consist of a fund adequate not only for the payment of the claims of the orators, but for the payment of all other stockholders having like claims, and must be a surplus fund over and above what is requisite for the payment of the current expenses of the business, for discharging its duties to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the contingencies of its business.

The orators' claims are in the nature of claims upon a particular fund upon which others have an equal claim, and to which another class of claimants may have a paramount right. The determination of the orators' rights might involve an accounting to ascertain the existence and the extent of the claims of others stand in like condition with the orators, &c., more appropriate for a court of chancery than for a jury in a court of law.

Jurisdiction. The defendant corporation exists and is operating its railroad under and by virtue of acts of the legislature of Vermont and Massachusetts respectively. Its railroad is located wholly within the two States, being partly in each. Therefore, the courts of Vermont as well as the courts of Massachusetts have jurisdiction of this corporation.

Bill in chancery.

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The bill charged that at the first meeting of the Vermont and Massachusetts Railroad Company, held November 21, 1844, in Boston, before the shares were fully taken, and in order to induce persons to become shareholders and members of said company, it was duly voted, "that all subscribers" (for stock) "be allowed interest on all sums paid by them up to the time when the road shall be completed and put into operation." That in pursuance of said vote, interest was allowed to stockholders, and paid until October 1, 1848; that the railroad of said company remained unfinished for six months and a half afterward, viz: until April 15, 1849; that the orators were shareholders in said company during said six and one-half months, or the representatives of persons then shareholders therein, and as such, became entitled to interest from said company upon their shares.

That the orators were severally credited, on the books of the said company, for the several sums found due to them respectively, for interest accrued up to April 15, 1849, on shares held or represented by them, the assessments of which had been, previously to October 1, 1848, paid in full; that by reason of the pecuniary inability of the defendant corporation, these interest dues were not provided for in any manner until the annual meeting of said corporation, holden February 9, 1853, when the vote was passed by said corporation, a copy of which is annexed, marked A; that in pursuance of the said vote, and of the vote of directors passed February 22, 1853, a copy of which is annexed, marked B, the orators severally discharged their names for interest credited them on the books of defendant corporation, and received in lieu thereof certificates for the several amounts herein above stated, the said several certificates being in the form prescribed in the aforesaid vote of the directors marked B. That in accepting the said certificates, they severally con-

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sented to defer the payment of their respective interest dues ; and that in issuing said certificates, the defendant corporation undertook and agreed that the sums therein named should be paid either on July 15, 1856, or as soon thereafter as the defendant corporation should be able to pay the same ; that said corporation were not able so to pay said certificates on July 15, 1856, or for many years after that day ; but have recently become able to pay the same, and are now able to do so, and have funds now in their treasury which they might and are in duty bound to apply and appropriate to the payment of said interest certificates, and sufficient to pay the same and all other certificates of like kind in full. That the orators have demanded payment of the said certificates, and requested that the said funds be applied to this purpose. Yet the said corporation wholly refuses and neglects to provide for the said certificates and apply the money in its hands to this purpose, as was agreed by the said corporation at the time of issuing the same, but has determined to divide the said moneys among the present stockholders of said corporation, and by vote of its directors has declared such a dividend in favor of said stockholders, payable on and after the ninth day of July instant, and unless restrained, they will so appropriate said sums instead of paying said interest scrip.

Prayer : That said corporation may be ordered and decreed to pay and satisfy the orators the several sums due them as aforesaid, and may be prohibited from paying out of its treasury any sums therein by way of dividends of profits to stockholders, until the further order of this court ; and for further relief.

A.

“Whereas the stockholders of the Vermont & Massachusetts Railroad Company did expect an interest

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dividend in April, 1849; and whereas the directors were deterred from declaring it as contemplated, by reason of the pecuniary inability of the corporation to meet and pay said dividend; and whereas, ever since said date the pecuniary resources of the corporation have been and still are totally inadequate to meet and pay said dividend; but nevertheless, as it is the wish of the stockholders to have this matter settled, it is therefore hereby voted that the directors be and they are hereby authorized and instructed to declare and adjust said dividends on and after the 15th of April next, by uttering certificates therefor, payable on July 15, 1856, to holders of stock on April 15, 1849, or their order, with the express understanding and agreement, that if there is not sufficient money in the treasury to meet the whole amount of said dividend on the day that it falls due, July 15, 1856, the holders of said scrip shall each and every one of them receive *pro rata* so much as the treasurer is able to pay, and as soon thereafter as the treasurer is able to pay the balance due on said interest scrips, he shall give due notice of the fact in two or more papers published in the city of Boston."

B.

"*Voted*, That the interest which accumulated between October 1, 1848, and April 15, 1849, on the payment of stock, be and the same is hereby declared and made payable according to the terms of the vote passed by the stockholders at their late annual meeting, on February 9, 1852, and that the the treasurer be empowered to issue certificates according to the purport of the said vote."

VERMONT & MASS. R. R. OFFICE, }
BOSTON, April 15, 1853. }

"This is to certify that
are entitled to

dollars, be-

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ing interest to April 15, 1849, on share of Vermont & Massachusetts R. R. stock, payable to the said or order, at this office, agreeably to a vote of the stockholders, passed February 9, 1853, a copy of which is on this certificate.

} JOHN ROGERS,
Treasurer.

“*Voted*, ‘That the directors be, and they are hereby authorized and instructed, to declare and adjust said dividends, on and after the 15th of April next, by uttering certificates therefor, payable on July 15, 1856, to holders of stock on April 15, 1849, or to their order, with this express understanding and agreement, that if there is not sufficient money in the treasury to meet the whole amount of the said dividend on the day it falls due (July 15, 1856), the holders of said scrip shall each and every of them receive, *pro rata*, so much as the treasurer is able to pay, and as soon thereafter as the treasurer is able to pay the balance due on said interest scrips, he shall give due notice of the fact in two or more papers published in the city of Boston.’”

The defendants by their answer admitted the allegations of the bill, but insisted that said vote of February 9, 1853, was not authorized by the call for the meeting at which it was passed, and was illegal and invalid, and alleged that some of the certificates held by the orators were issued for a larger sum than interest at six per cent. upon the assessment actually paid in upon the shares therein mentioned, and that the sums therein mentioned represent the interest upon the nominal amount of said shares, when a much less sum was actually paid upon each, and that if the orators had any valid claim against the defendants for the payment of said interest, they had a full and ample remedy at law therefor. The answer was traversed, and the case was heard upon the bill, answer, replication and

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proofs, before BARRETT, Chancellor, who, *pro forma*, dismissed the bill with costs to the defendants, from which decree the orators appealed.

H. E. Stoughton, for the orators.

Charles P. Marsh, for the defendants.

BY THE COURT.—PECK, J.—The corporation had authority to stipulate, as it did, that each stockholder should be entitled to interest on sums paid on stock subscriptions, while the road was in process of construction, till it should be completed and go into operation; payable whenever the surplus earnings should enable it properly to do so, that is, when the corporation should be pecuniarily in condition to warrant the payment of dividends. In the early stages of such undertakings, the use of money necessary for the construction of the road may be presumed to be worth the legal interest; and therefore, he who pays early practically contributes more than he who pays the same sum late. This arrangement for the payment of interest, or interest dividends, so called, is equitable and just, as it is but a mode of distributing benefits among the stockholders in proportion to the aid they have respectively contributed to the common enterprise, and thus producing equality between them. Equality is equity as between the stockholders; and such payment, made only out of the surplus earnings not needed for the payment of debts of the corporation, nor for the prosecution of its business, does not interfere with the rights of creditors, nor contravene any principle of public policy. It is no more withdrawing capital from the corporation than would be the payment of ordinary dividends, to which purpose the fund would otherwise be appropriated. Nor is there any want of legal consideration to uphold the promise. In addition to the

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equality thereby to be produced among the stockholders, it is apparent that they paid in their money on the faith of this agreement; for it had its origin in the outset of the enterprise. In the original stock subscription contract, there was a recommendation that when the stockholders should be organized as a corporation, they pass a vote binding the corporation to pay interest on all sums assessed and paid in before the road should be put in operation, and that each subscriber have the privilege of paying in, at any time, the whole amount of his subscription after a vote of the stockholders to that effect, and receive interest thereon until the railroad should go into operation. This was carried out at the meeting of the stockholders November 21, 1844, at which the corporation was organized, by the vote of the corporation, "that as soon as any assessment or assessments on the capital stock shall be laid, each subscriber shall have the privilege of paying in, at any time, the whole amount of his subscription, or any portion thereof, provided that such portion thereof be not less than the amount of one or more assessments, and that all subscribers be allowed interest on all sums paid by them, up to the time when the road shall be completed and put in operation." It is insisted on the part of the defense that this vote was not binding, for the reason that the subject was not specially named in the notice calling the meeting. It is not necessary to pass upon this objection, for the corporation having the right to pass such a vote, and the objection being only to the formality of the proceeding, the defect, if any, was capable of being cured by subsequent ratification. The subsequent action of the corporation, in paying the interest to stockholders under and in pursuance of this vote, as shown by Rogers, the treasurer of the corporation, and other evidence in the case, and particularly in the vote of the corporation at its annual meeting, February 9,

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1853, and the vote and action of the directors, and action of the treasurer in carrying out that vote, is a ratification of the vote of November 21, 1844. It appears that the interest was paid to the stockholders from time to time up to October 1, 1848, and that the road was not completed till April 15, 1849, when interest ceased to accrue. The interest accruing from October 1, 1848, to April 15, 1849, remaining unpaid, the vote of the corporation, at the annual meeting, February 9, 1853, was passed for the issuing certificates to the stockholders for the amount of such unpaid interest, payable July 15, 1856, with a provision that if there is not sufficient money in the treasury on the 15th of July, 1856, to meet the whole amount of such certificates or dividend, the holders of such scrip shall receive *pro rata* so much as the treasurer is able to pay; and as soon thereafter as the treasurer is able to pay the balance due on such interest scrip, he shall give notice of the fact, &c. In pursuance of this vote the directors passed the vote of February 22, 1853, and the treasurer proceeded to issue the certificates accordingly. The orators seek to recover only according to the terms of these last two votes, and the adjustment made and certificates issued in pursuance of them. It is claimed in defense, that the vote of the stockholders of February 9, 1853, is not binding, because the subject of the vote was not named in the call of the meeting. The answer to this is, that article 2 of the by-laws provides that "at the annual meetings any matter may be acted upon within the power of the corporation." We think, therefore, that the proceedings of the corporation, terminating in the issuing of the interest certificates, created an obligation upon the corporation to pay according to the terms and conditions of such certificates. The policy, as well as the validity of such contracts, has been frequently recognized. *Waterman v. Troy & Greenfield R. R. Co.*, 8 *Gray*, 433; *Rut. &*

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B. R. R. Co. v. Thrall, 85 Vt. 536. In *Waterman v. Troy & Greenfield R. R. Co.*, the plaintiff failed upon the ground that the action was premature; the court very properly holding that the construction of the agreement (which was similar to the vote in this case of November 21, 1844), was, that the interest was not payable till the road was completed and in operation, and the corporation in receipt of income from its business. The conclusion to which we have come in this case is not in conflict with the decisions in Massachusetts, in suits at law between some of these stockholders and this defendant corporation, relative to this interest on payments upon stock subscriptions. *Wright v. Vermont & Massachusetts R. R. Co.*, 12 *Cush.*, was commenced July 3, 1849, before the vote of February 3, 1853, fixing the time and prescribing the contingency upon which the payment should be made. SHAW, Ch. J., speaking of the vote of November 21, 1844, says: "Supposing the original vote of the stockholders should be regarded as declaring a general right of the stockholders, previously to paying in any installment on the shares, that each should be entitled to interest, to be computed on his payments, from the time of each payment to the time when the railroad should go into operation and be in condition to earn income and pay dividends, this would be equitable, because it would put stockholders on an equal footing, whether they should pay earlier or later. It would encourage capitalists to advance their money early to meet the exigencies of the company before it could enjoy any income; and it seems right that the use of such capital should be paid for as a common charge on all." In that case it did not appear that the road was completed or put in operation at the commencement of the suit, or that the corporation was pecuniarily in a condition to pay; and the case turned on the point that the action was premature. The language of SHAW,

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Ch. J., in delivering the opinion of the court, is, that "whether the plaintiff might or not maintain an action to recover this claim when the road should be completed and put in operation, we do not perceive how he could do it before that time, without some vote of the corporation fixing the time of payment and making it payable in money." *Barnard v. Vermont & Massachusetts R. R. Co.*, 7 *Allen*, 512; and *Cunningham v. Vermont & Massachusetts R. R. Co.*, 12 *Gray*, 411, were commenced after the railroad was completed and in operation, and after the vote of February 9, 1853, and the issue of the interest certificates in pursuance of it; but the plaintiffs failed to recover, not because the defendant was not under obligation to pay according to that vote, but on the ground that the contingency of the possession by the defendant, of sufficient funds for that purpose, specified in that vote, was not shown. This objection to a recovery by the plaintiff, on which those cases turned, is obviated in this case by the admission in the answer, as well as by the proof in the case, of abundant funds to answer the contingency and fulfill the condition on which the interest was to be paid.

It is claimed by the defendant's counsel, that the interest could not legally be voted to stockholders, who were such at any given time, to the exclusion of others who subsequently acquired stock before the dividend is declared. But no other persons appear to have asserted the right to the interest claimed by the orators, and specified in the orators' certificates of indebtedness, nor are such facts shown as establish any superior equity outstanding in any other persons.

As to the amount on which the interest should be cast upon the seventy-five-dollar stock, and the fifty-dollar stock, a question is made whether it should be cast upon the one hundred dollars, the nominal amount of the shares, or upon the sum which the subscribers

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actually paid. We think, upon the facts appearing in this case, that notwithstanding this stock was to be of equal rank and value as the other stock for which one hundred dollars per share was paid, yet in the matter of this interest, such stockholders should be limited to "*interest on all sums paid by them,*" according to the language of the original vote of November 21, 1844, and are not entitled to interest upon the nominal value of one hundred dollars per share, and that the certificates should be reduced accordingly.

There is not such a clear, complete and adequate remedy at law, as to require or justify the denial of relief in a court of equity, on the ground that the remedy must be at law. The ability of the corporation to pay, which constitutes the contingency upon which these certificates are payable, must be construed in reference to the nature of the subject, and the relative condition of the parties, and their duty to creditors having a paramount right. The mere fact of the corporation having funds in its treasury, sufficient in amount to pay the orators, would not be sufficient to show the *ability of the corporation* contemplated in the vote and certificates. That ability must consist of a fund adequate, not only for the payment of the claims of the plaintiffs in the cause, but for the payment of all other stockholders having like claims; and must be a surplus fund over and above what is requisite for the payment of the current expenses of the business, for discharging its duties to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks and contingencies incident to the business of operating the railroad. In other words, there must be such pecuniary ability as would, but for the obligation to pay this interest, justify the payment of a dividend to stockholders. The orators' claims are in the nature of claims upon a particular fund, upon which others have

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an equal claim, and to which another class of claimants may have a paramount right. The determination of the orators' rights might involve an accounting to ascertain the existence and extent of the claims of others standing in like condition with the orators, and also other investigations and inquiries into the condition of the corporation in various aspects, more appropriate for a court of chancery than for a jury in a court of law. The case is one proper for chancery jurisdiction; notwithstanding, in this particular case, the admission in the answer, of funds properly applicable to the payment of these claims, if valid, renders proof on these points unnecessary.

The defendant corporation exists and is operating its railroad under and by virtue of acts of the legislature of Vermont and of Massachusetts, respectively. The railroad is a continuous line, located wholly within the two States, being partly in each. It results legally from this that the courts of Vermont, as well as the courts of Massachusetts, have jurisdiction of this corporation. In addition to this, it is provided in the said act of the legislature of Vermont, under which the corporation exists, in the manner already stated, that some officer of the company shall at all times be an inhabitant of Vermont, on whom process against the company may be legally served, and the company shall be held to answer in the jurisdiction where the service is made and the process is returnable. The objection urged by the defendant's counsel to the jurisdiction of the courts of Vermont over this corporation, involves the absurdity of holding it not within the jurisdiction of the courts of either State, and is without color of foundation.

The decree of the court of chancery is reversed, and the orators are entitled to a decree according to the prayer of the bill, with costs, except that on the seventy-five-dollar stock and the fifty-dollar stock in-

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terest should be cast upon the sum paid to the corporation therefor, instead of upon its nominal amount of one hundred dollars per share, and the interest certificates should be reduced accordingly wherever the stock can be identified and distinguished from the stock for which one hundred dollars was paid to the corporation. The cause is remanded to the court of chancery, with directions to enter decree for orators, as above indicated.

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44 *Vermont*, 294.

Realty. A lessee of premises who puts a dwelling-house thereon by permission of the owner of the fee and with the right to move off the house at the expiration of the lease if the lessee complies with the terms of the lease, has such an interest in the realty as he or she may convey by mortgage. It is an interest in real estate, and the house and underpinning stones become attached to and a part of that interest.

The plaintiff having a mortgage interest in the premises, had a right to show such interest by the deed and the proceedings to foreclose the same.

Pleadings. Trespass on the freehold and on the case, when for the same cause of action, can be joined, such joinder being authorized by section 14, chapter 83, General Statutes.

Mortgage. Whenever the condition of a mortgage is broken, at law the interest of the mortgagor in the premises thereupon becomes absolutely vested in the mortgagee, and he has a right to the immediate possession of the premises.

If T., who mortgaged to the plaintiff, had moved the house and underpinning wall from the mortgaged premises, under the circumstances of this case, the plaintiff could maintain an action of trespass *qu. cl.* or an action on the case in the nature of waste against T. for such removal.

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Notice. The defendants, who acquired the right of T. in the premises *in invitum*, for the use of their railroad, under the statute, are subject to the same liabilities to the plaintiff for such removal, he having had no notice of the proceedings to appropriate said premises, as T. would be for doing the same thing.

Railroad. It is not sufficient, in proceedings to condemn real estate to the use of a railroad, for the appraisers to give notice to the occupant thereof, and award him damages, and ignore the rights of other parties in the premises. *Keyes v. Prescott*, 32 Vt. 86, explained and approved.

Trespass, *qu. cl. fr.*, and case, for the same cause of action. There were two counts in *trespass*, charging that the defendants, on different dates, broke and entered the plaintiff's close, and took away a dwelling-house and one hundred loads of stone, and continued to occupy said close, and one count in *case*, alleging that the plaintiff, on February 20, 1866, was the owner and holder of a certain mortgage deed, executed by one Mary Ann Turner of the same close, described in the above counts; that the plaintiff, on March 20, 1866, commenced a suit to foreclose said mortgage, which was entered in the court of chancery, within and for said county of Franklin, at the April term, 1866, and that the plaintiff, on April 20, 1866, obtained a decree against the said Mary Ann Turner, which expired on April 20, 1867, the said Mary Ann having failed to redeem said premises, and the title thereto, so far as the said Mary Ann had any interest therein, became absolute in the plaintiff; and that on June 27, 1866, the defendants entered upon said premises and drew off a dwelling-house and one hundred loads of stone, and have since occupied said premises.

Plea, the general issue, and two special pleas alleging that Henry Seymour was the owner of said close; that the same was near to and adjoining the Vermont and Canada Railroad; that before the defendants entered said close, and went into possession thereof,

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the said Seymour had given Mary Ann Turner license to place on said close said dwelling-house, to remain until May 1, 1867, together with the right to remove the same from said close; and that before and at the several times when, &c., the said Mary Ann had by said license placed said dwelling-house upon said close, and was occupying the same; that said close became necessary for the depot accommodations of said railroad, and commissioners were duly appointed who appraised the damages of said Seymour and said Mary Ann, which damages the said railroad company paid; that said Mary Ann removed said dwelling-house and said stone, and the defendants, as trustees of a railroad company, thereafter went into possession of said close, and erected a depot building thereon, and said close has ever since been occupied by said railroad company.

Replication denying that the plaintiff had notice from said commissioners, or said railroad company, of the appraisal of damages to said premises, and alleging that said railroad company and the defendants were notified by the plaintiff not to pay the damages awarded to Mary Ann Turner.

Trial by jury at the April term, 1871, ROYCE, J., presiding. Verdict for the plaintiff.

On the trial, the plaintiff offered a mortgage deed from Mary Ann Turner to himself, of the premises in question, dated September 26, 1864, conditioned for the payment of a note for five hundred dollars, dated May 27, 1864, payable one year from date. The defendants objected to the admission of this deed in evidence. The court overruled the objection and admitted the deed, to which the defendants excepted. The plaintiff also introduced a petition for the foreclosure of the above mortgage, in favor of the plaintiff against the said Mary Ann Turner, and a decree of the court of chancery thereon, dated April 20, 1866, and expiring April 20, 1867.

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The plaintiff also introduced a lease from Henry Seymour to Mary Ann Turner, dated November 21, 1860, of the premises from which said buildings were removed, for the term of three years from the first day of May, 1861, by the terms of which, if she complied with all the conditions of said lease, she had a right to move off said buildings at the end of the lease, and that the said Seymour, in case of the failure to perform by the said Mary Ann Turner, of the covenants and stipulations on her part in said lease, might remove said buildings from the premises at her expense. It was not claimed that Mary Ann Turner had any other right to the premises than such as she had by virtue of said lease or an alleged parol extension thereof, the offer to prove which by the plaintiff was excluded by the court. Prior to the time of the trial the action had become discontinued, as to the defendant Brainerd, by his death.

After the plaintiff rested, the defendants moved that the third count of the declaration be dismissed for a misjoinder.

The court overruled the motion, to which the defendants excepted.

The defendants also put into the case the deed from Hiram S. Kilburn to Henry Seymour, dated April 15, 1834, which conveys the land on which the said buildings stood, together with other lands; also a copy of the condemnation of said land by the Vermont and Canada Railroad Company, dated May 22, 1866, under which the defendants went into possession of the premises; also the appraisal of damages to Mary Ann Turner for the property.

The defendants also put into the case a mortgage deed from Mary Ann Turner to the plaintiff, dated April 13, 1863, and a mortgage from Mary Ann Turner to the Vermont and Canada Railroad Company, dated September 14, 1866. Upon the foregoing facts the de-

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fendants requested the court to direct a verdict for the defendants, for the reason that there was no proof in the case supporting either count of the declaration. The court refused this request of the defendants, and ruled *pro forma* that the plaintiff had shown such an interest in the property as would entitle him to sustain the suit upon the third count in the declaration; to which refusal of the court to direct a verdict for the defendants, and his instruction as above set forth, the defendants excepted.

Edson & Rand and *Noble & Smith*, for the defendants.—The mortgage from Turner to plaintiff, of September 26, 1864, was given after the written lease from Seymour to Turner had expired by its own limitation; consequently, Turner had no interest in the premises she could mortgage. 7 *Barb.* 599; 25 *Eng. L. & Eq.* 37. The condemnation of the premises for the uses of the railroad, May 22, 1866, is a full defense to the defendants for entering upon the same, and the plaintiff cannot sustain trespass *quare clausum*; the plaintiff neither having title nor possession of the premises. *Runyan v. Mersereau*, 11 *Johns.* 538; *Jackson v. Willard*, 4 *Id.* 41.

The plaintiff having neither title nor possession of the premises, there is no principle of law upon which the defendants were bound to appraise damages to him, or to regard any debt that Turner might be owing him. Turner was only a tenant at will or sufferance. *Gen. Stats.* 220, § 20; *Breed v. Eastern R. R. Co.*, 5 *Grey*, 470, note; 2 *Washb. Real Prop.* 156; *Parish v. Gilmanter*, 11 *N. H.* 293; *Wright v. Turkey*, 3 *Cush.* 290; *Norwich v. Hubbard*, 22 *Conn.* 587; *Howard v. Robinson*, 3 *Cush.* 119.

Turner did not undertake to mortgage the building or the stone to plaintiff. If plaintiff obtained any lien upon the building, it attaches as well were it now

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stands—on the land where Turner moved it to—as on the land in question. If the building and stones were chattels, and owned by Turner, a mortgage of them to the plaintiff would be of no validity while Turner remained in possession. The plaintiff cannot maintain trespass *quare clausum* unless he can show possession, or the right of possession, as against Seymour or these defendants. *Ripley v. Yale*, 16 *Vt.* 257. Trespass upon the freehold and case cannot be joined. *Keyes v. Prescott*, 32 *Vt.* 86.

E. A. Sowles and Royce & Hall, for the plaintiff.—The statute provides that counts in trespass may be joined with trespass on the case, if for the same cause of action. If there was a misjoinder, a verbal motion to dismiss on trial would not avail the defendants. Their remedy would be by demurrer. The plaintiff could then elect the particular count or counts he desired to recover on. 1 *Chitty on Plead.* 200; *May v. Williams*, 3 *Vt.* 239. The defendants' several pleas admit that Mary Ann Turner had a lease of the premises until May 1, 1867. The defendants are, therefore, estopped from denying that fact by their pleadings. 1 *Saunders on Plead. & Ev.* 39.

The case shows that the plaintiff had foreclosed the mortgage and obtained a decree before the property was taken by defendants. The interest in the premises had then become his—subject to the right of Mary Ann Turner to redeem. The decree expired without redemption before the lease expired; whereby the plaintiff became the absolute owner of the interests of said Turner therein. *Gen. Stat.* 339, § 12, 364, § 15; *Atkinson v. Burt*, 1 *Aik.* 329; *Lyman v. Mower*, 6 *Vt.* 345; *Wilson v. Harper*, 13 *Id.* 653; *Pierce v. Brown*, 24 *Id.* 165; *Smith v. Goodwin*, 2 *Me.* 173. The case shows that the defendants, as trustees of the Vermont Central and Vermont & Canada railroads, removed the

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house, or caused the same to be removed, and appropriated the stones to their own use, and interfered with and destroyed plaintiff's interest in the premises without compensation and without notice as required by statute. In proceedings *in invitum* courts watchfully and scrupulously protect the rights and interests of private individuals. Hence the court below did not err in directing *pro forma* that plaintiff could recover on his count. *Gen. Stat.* 220, 221, §§ 21, 26; *Claremont Bridge v. Royce*, 12 *Vt.* 730; *Brown v. Smith*, 1 *N. H.* 36; 1 *Saund. on Plead. & Ev.* 334.

BY THE COURT.—ROSS, J.—I. The defendant's first exception is to the admission in evidence of the plaintiff's mortgage deed of the premises from Mary Ann Turner, and the foreclosure of the same. They insist that the dwelling-house and underpinning stones sued for were but the chattels of Mary Ann Turner, on the land, and not capable of being conveyed by mortgage; that there were conditions in the lease, which for the last three years was in parol, or a parol extension of a written lease, which rendered her a tenant at sufferance of Mr. Seymour; and that, as Mr. Seymour might have terminated the lease at any time, they, having taken Mr. Seymour's interest in the land, stood on his rights, and could terminate the lease, enter, and remove the house and stones, without being liable therefor to the plaintiff, who at best, stood in the rights which Mary Ann Turner acquired under the lease. It is to be observed that the defendants by their pleas in bar, and by their appraisal of the land damages, admit Mary Ann Turner's right to occupy the premises till May 1, 1867. By these admissions they are estopped from denying the facts they have thus conceded. We entertain no doubts but that Mary Ann Turner, having an estate in the premises which expired May 1, 1867, occupied by a dwelling-house, which had been placed

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there with the permission of the owner in fee, had an interest in the property that she could convey by mortgage. It was an interest in real estate—the right to use it for a limited time with a dwelling-house. The house and underpinning stones became attached to and a part of that interest. It was such an interest as could have been taken by a levy, and set off on an execution in satisfaction of a judgment against her. “The word land or lands, and the words real estate, shall be construed to include lands, tenements, and hereditaments, and all rights thereto, and interests therein.” *Gen. Stat.* ch. 4, § 8. “Conveyances of land, or of any estate or interest therein may be by deed,” &c. *Gen. Stat.* ch. 65, § 1. The plaintiff having a mortgage interest in the premises, such an interest as Mary Ann Turner had, as the court properly held, had the right to show it by his deed, and the proceedings to foreclose the same.

II. The defendants excepted to the ruling of the court, refusing to dismiss the plaintiff's third count for misjoinder. They cite *Keyes v. Prescott*, 32 Vt. 86, to show that trespass on the freehold and on the case cannot be joined. The court in that case decide that a count for a penalty to recover treble damages for entering upon the freehold and cutting and removing growing trees, and a count in trover cannot be joined; but hold that trespass on the freehold and on the case, when for the same cause of action, can be joined as authorized by section 14 of chapter 33 of the General Statutes. *Alger v. Carey*, 32 Vt. 382. All the counts in the plaintiff's declaration are to recover for the removal of the same dwelling-house and underpinning stones.

III. The defendants' third exception is to the refusal of the court to direct a verdict for the defendants, “for the reason that there was no proof in the case supporting either count of the declaration.”

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The plaintiff proved that he had a mortgage of the premises from Mary Ann Turner, and that he had foreclosed the same, just as he alleges in the third count in the declaration, and gave evidence tending to show that the defendants entered upon the premises covered by his mortgage, and removed the dwelling-house and underpinning stones. This exactly supported the third count in the declaration, as was held by the court. This disposes of all the questions actually raised by the exceptions.

IV. The counsel upon both sides have discussed the case as though the defendants' third exception was in regard to the right of the plaintiff to maintain an action against the defendants, under the conceded facts in the case. We will, therefore, consider it from that point of view. The defendants insist that the plaintiff, having only a mortgage interest in a leasehold estate, cannot maintain this action against them, who have proceeded under the statute to condemn, and pay for, the interest of the owner in fee, and of the lessee. Can they justify the removal of the dwelling-house and underpinning stones, under either the right of the owner of the fee, or the right of the lessee? They cannot justify under the right of the owner of the fee. He had parted with his right to use and occupy the premises to the lessee, and could not have entered and removed the house and underpinning wall till the expiration of the lease. The defendants understood this, and, therefore, had their commissioners award damages to the lessee, because they took her unexpired term of the leasehold estate, and compelled an immediate removal of the house. The defendants stand no better than the owner of the fee, while justifying under his rights. They cannot justify under the rights of the lessee. The decree of foreclosure establishes that the condition of the mortgage had been broken. Upon the happening of that event, at law the interest of the lessee in the

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premises became absolutely vested in the plaintiff, and the plaintiff had a right to the immediate possession of the premises. Thereafter the mortgagor holds as tenant of the mortgagee; whether as tenant at will, or at sufferance, or as tenant by mortgage, matters not. 2 *Washb. Real Property*, 517, 518. In *Moore v. McGuire*, 4 *Vt.* 327, the court held that if a mortgagee, after condition broken, assign the mortgage, and the mortgagor cut timber and leave it upon the premises until after the assignee takes possession, the mortgagor cannot maintain trover against the assignee for using the timber. The court says: "Upon this state of facts, the said intestate was a wrongdoer in cutting the timber, and he could gain no title to it against the defendant, who was then owner as mortgagee, with a right of possession, by such wrongful cutting. The said intestate's right to possession, under our statute, had ceased with the arrival of the pay-day without payment. His possession, when he cut the timber, was a mere tenancy at will." In *Lull v. Mathews*, 19 *Vt.* 322, the court held that the purchaser of wood at a sheriff's sale, cut on the mortgaged premises by the mortgagor after condition broken, and suffered to remain on the premises till after the day of redemption expired, obtained no title to the wood against the mortgagee; that the mortgagor was a wrongdoer in cutting the wood, and acquired no title to it, and that the purchaser, by the sale, obtained only the mortgagor's title. In *Langdon v. Paul*, 22 *Vt.* 205, the court, upon full consideration, held that the mortgagee could maintain an action on the case, in the nature of waste, or of trover, against the mortgagor, for timber cut on the mortgaged premises after a decree of foreclosure, and before the expiration of the time limited for redemption. Mr. WASHBURN, in the first volume of his work on Real Property, p. 529, states the same doctrine. He says: "And although a mortgagee may not have a technical action

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of waste against the mortgagor in any case, he may have trespass *quare clausum* for any act done by him or his authority, essentially impairing the inheritance, such as cutting timber, tearing down houses, fixtures, and the like, though trespass will not lie against the mortgagor, or his tenant, for any acts of occupation done by either, before entry made by the mortgagee, though after condition broken; nor will assumpsit lie for rent in such a case." By these authorities, if Mary Ann Turner, the lessee of Mr. Seymour, and mortgagor of the plaintiff, had removed the house and underpinning wall, under the facts which the jury have found existed, at the time the defendants removed them, the plaintiff could have maintained an action of trespass *quare clausum*, or an action on the case in the nature of waste, against her for such removal. How do the defendants, justifying under her rights, stand any better than she would? We are unable to find any better reason for protecting them, though they are the representatives of a corporation, than for protecting the woman in whose rights they have removed the house and underpinning wall. The defendants rely considerably upon the provisions of section 17 of chapter 28 of the General Statutes, which requires the commissioners to give twelve days' notice to the "occupants or owners of the lands to be appraised," and aver that they have complied with this statute. Can it be held, that if they give notice to the occupant, and not to the owner, and appraise and pay the damages to the occupant, the owner is without remedy? We think not. The plaintiff was the owner of the house and underpinning wall, and of the leasehold interest in the premises. The commissioners have given him no notice, awarded him no damages; neither have the defendants paid him any. Sections 21, 22, and 23 of the same chapter, point out a method of procedure for the protection of the defendants, where the

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owner is unknown, "or where there are conflicting claims to the title, or where such lands are incumbered by mortgages, attachments, or levy of execution, or otherwise." The defendants did not resort to this plain provision of the statute to protect themselves, but appraised the leasehold estate to the wrong person, and paid the damages to the wrong person. As regards the plaintiff, the owner, they entered the premises, removed the house and underpinning wall, without notice, or appraisal of damages, or the tender of compensation by way of damages, and were wrongdoers.

Judgment of the county court is affirmed.

McELRATH v. THE PITTSBURG AND STEUBEN-
VILLE RAILROAD CO.

CHAPMAN'S APPEAL

68 *Pennsylvania* (18 *Smith*) 87.

1. In distributing the proceeds of a sale of a railroad, &c., the master is limited to *distributing* the fund to the parties entitled under the decree; he cannot go behind the decree to inquire whether the parties claiming are entitled to a position different from that which the decree assigns them.
2. There were a first and second mortgage on a railroad. The trustee under the first filed a bill to foreclose and make the trustee under the second a party. A decree having been made postponing the second, a bondholder under it alleging error should ask for a review or a rehearing.
3. Bondholders under such mortgages are not parties; the true party is the trustee, and he is to be summoned to defend the interest of those claiming under the mortgage.
4. The bondholders are privies and may defend *pro interesse suo*, but their rights are affected by a decree against the trustee.

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5. The bondholder is not as a creditor claiming a right to attack the decree of an opposing creditor for collusion or fraud, between the plaintiff and defendant, but is affected by the decree against his own trustee.
6. In the distribution it was competent for one to claim that he owned bonds entitled to a dividend, which were presented and claimed by another.
7. Souder's Appeal, 7 *P. F. Smith*, 498, recognized.

February 27th, 1871. Before THOMPSON, Ch. J.,
AGNEW, SHARSWOOD and WILLIAMS, JJ.
READ, J., at *Nisi Prius*.

Exceptions by George M. Chapman to the report of Samuel G. Thompson, Esq., master, distributing the proceeds of the sale of the Pittsburg and Steubenville Railroad under proceedings at the suit of Thomas McElrath. See 5 *P. F. Smith*, 189, where the facts in the case are fully stated.

In 1865, to October and November term, No. 42, of the western district of the supreme court, a bill was filed by McElrath, trustee under a first mortgage of the Pittsburg and Steubenville Railroad Company, against that company, Ambrose W. Thompson and Daniel Tyler, trustees under a second mortgage of the same company, and others.

The prayers of the bill were, that McElrath's mortgage might be declared to be the first lien and binding on the railroad, &c., that the amount due on it might be ascertained and the company decreed to pay, or in default, that a decree be made to sell the mortgaged premises.

On May 13, 1867, the Supreme Court decreed that McElrath's mortgage was the first lien; that the amount due on it was eight hundred and sixty-five thousand two hundred and thirty-four dollars and six cents, which the company should pay to McElrath in ninety days, and in default, that McElrath as trustee

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sell the road, &c. The sale was subsequently made to William J. Howard for one million nine hundred and sixty thousand dollars, and was confirmed November 20, 1867.

Amongst other claimants on the fund were George M. Chapman, holder of thirty thousand dollars of the second mortgage bonds of the company, and also of a large amount of their certificates of indebtedness, and William J. Howard, the holder of all the first mortgage bonds.

Before the master, Chapman offered to prove:—

1. The Pennsylvania Railroad Company from 1858 had been conspiring with others and contriving to get the ownership of the Pittsburg and Steubenville Railroad Company with its franchises, &c., in fraud of that company and its creditors.

2. The Pennsylvania Railroad Company, under the name of the Western Transportation Company, leased the Pittsburg and Steubenville Company, December 30, 1857, and contracted, June 3, 1858, to build the road.

3. There was no such valid corporation as the Western Transportation Company, but it was a pretended corporation, in whose name the Pennsylvania Railroad Company was acting, to take the lease and make the agreement.

4. The Pennsylvania Railroad Company, by fraudulent breaches of the covenants in the lease and contract, brought insolvency on the Pittsburg and Steubenville Company, and caused the sale of the franchises of that company under the decree in this case.

5. "The Pennsylvania Railroad Company, soon after the dates of the lease and contract, in pursuance of said fraudulent design and conspiracy, induced the holders of the first mortgage bonds, who had acquired them prior to those dates, to deliver them to the Pennsylvania Railroad Company, or its president acting for it, in exchange for second mortgage bonds. The ex-

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change was procured by misrepresentations and deceptions and on conditions which were never complied with, and the holders of the second mortgage bonds so exchanged are entitled to the first mortgage bonds which were given for them in exchange."

6. One of the breaches of the covenants in the lease and agreement was the failure to provide means for the payment of the interest on the mortgages, and thus was brought about the default which led to the sale.

7. The Pennsylvania Railroad Company as trustee, issued first and second mortgage bonds in violation of the agreement, for purposes, &c., not warranted and without authority and without any value or consideration, to the Pittsburg and Steubenville Company.

8. The Pennsylvania Railroad Company was debtor to the Pittsburg and Steubenville Company for damages, &c., from breaches of the covenants to an amount larger than the amount of the bonds claimed by Howard.

9. The bonds presented by Howard belonged to the Pennsylvania Railroad Company, having been fraudulently bought in by that company with a view to purchase the road, &c., of the Pittsburg and Steubenville Company.

10. The Pennsylvania Railroad Company was the real plaintiff in this suit to effect the sale of the road, &c.

11. Ambrose M. Thompson, one of the trustees in the second mortgage, had no notice of the proceedings previously to the sale; Tyler, the other trustee, acting in collusion with the Pennsylvania Railroad Company, and in fraud of the bondholders for whom he was trustee, accepted service of the bill, failed to answer, gave no notice to his co-trustee or the bondholders, abandoned all care in the matter, suffered a decree *pro confesso* against him, and decree for the sale of the road, &c.

12. The Pennsylvania Railroad Company, by reason

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of the foregoing facts, are estopped from any claim on the fund now for distribution, particularly from claiming for the first mortgage bonds against the second mortgage bonds, and each holder of a second mortgage bond is entitled to claim as if a holder of the first mortgage bond, of which he has thus been fraudulently deprived in the hands of that company.

13. "George M. Chapman is a holder of second mortgage bonds amounting to thirty thousand dollars, being bonds so fraudulently given in exchange for first mortgage bonds now presented by the Pennsylvania Railroad Company, and also the certified estimates mentioned in the bill to the amount of fifty-two thousand five hundred and forty-five dollars, and claims for work and materials two hundred and seventy-seven thousand dollars. He had no notice of any kind."

The master being of opinion that all the matters presented by the foregoing offers had been considered and passed upon the proceedings for the sale of the road, &c., and that he was concluded by the decree, rejected the offers, excluded Chapman's claims from the distribution, and reported a dividend of the fund on the bonds, &c., presented by Howard.

Chapman filed exceptions to the master's report, viz:

The rejection of his offers of evidence and awarding the fund to Howard.

E. S. Miller, for exceptor.

T. Cuyler, contra.

BY THE COURT.—AGNEW, J.—The railroad, property, estate and franchises of the Pittsburg and Steubenville Railroad Company, mortgaged to Thomas McElrath to secure the payment of one million dollars of bonds, were sold under a decree of this court for one million nine

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hundred and sixty thousand dollars, and the distribution of this sum is the proceeding now before us. The inquiry of the master was limited solely to the distribution of the money among the parties entitled to receive it under the decree. He could not go behind the decree to inquire whether it was rightfully made or whether the parties before him were entitled to hold a position different from that which the decree assigns to them. If George M. Chapman, as a holder of bonds under the second mortgage of five hundred thousand dollars, was erroneously postponed in payment to the holders of the bonds under the first mortgage, it was his business to come before the court to review the decree against the second mortgage or obtain a rehearing. The bondholders in such a mortgage as this is are not the parties to it, though they have rights under and claim through it. The true party is the trustee to whom it is given as the security for all the bonds issued under it. It would be impossible, and if possible, excessively inconvenient, to make all parties holding the bonds, which are separate instruments, parties to the decree of foreclosure and sale under the mortgage. The bonds are payable to bearer and pass by delivery, and who the holders are after they pass into the current of business cannot be told. Hence, the trustee is the party to be summoned to defend the interest of those who claim under the mortgage. The bondholders are privies in interest, and may come in to defend *pro interesse suo*, but their rights are affected by the decree against their trustee. Chapman, therefore, as a holder of bonds under the second mortgage, is not a stranger claiming collaterally, but must come in under the mortgage. He does not stand in the attitude of another creditor claiming a right to attack the decree or judgment of an opposing creditor upon the ground of collusion or fraud between the plaintiff and defendant in the judgment, but he is affected by the decree

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itself against his own trustee. These principles will be found to be sustained by the following cases: Dougherty's Estate, 9 *W. & S.* 189; Dickerson's Appeal, 7 *Barr*, 255; Thompson's Appeal, 7 *P. F. Smith*, 175; Clark v. Douglass, 12 *Id.* 408. The bill was filed against the trustees of the five-hundred-thousand-dollar mortgage and the decree made against them. If there were any collusion on the part of the trustee and the plaintiffs affecting the interest of the bondholders under the second mortgage, they had their remedy against the colluding trustee, or by application to this court in proper time and form to set aside the decree. The master was right, therefore, in refusing to hear all the offers of evidence made by the exceptant, except the 5th and 13th. Those two, taken together, presented a question in the distribution itself. In connection with so much of the 9th offer as alleges that the Pennsylvania Railroad Company is the real owner of the bonds presented by William T. Howard, Esq., for payment under the first mortgage, the 5th and 13th offers allege in substance that George M. Chapman is the owner of thirty thousand dollars of the first mortgage bonds now presented for payment by the Pennsylvania Railroad Company, and was fraudulently induced by that company to exchange them for thirty thousand dollars of the second mortgage bonds. He claims, therefore, as the true owner of these thirty thousand dollars of first mortgage bonds, to receive the money to which they are entitled in the distribution. The question thus presented is simply one of ownership, and it was competent for the master to hear and determine it, as we held in Souder's Appeal, 7 *P. F. Smith* 498. In other respects we perceive no error in the master's report. We, therefore, sustain so much of the first exception of G. M. Chapman to the report as embraces the question of the ownership of the thirty thousand dollars of first mortgage bonds above stated, and

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remand the report to the same master for a hearing and decision of this question.

WHITE MOUNTAINS RAILROAD v. WHITE
MOUNTAINS (N. H.) RAILROAD.

50 *New Hampshire*, 50.

Fraudulent and illegal sale of franchises does not work dissolution of corporation.

Where a statute provides that a corporation shall be dissolved by a mortgage sale of its franchises and property, an illegal and fraudulent sale does not work a dissolution.

It is no objection to the maintenance of a bill in equity to compel a corporation to restore property acquired by fraud, that such restoration will cause a dissolution of the corporation.

In 1858 the White Mountains Railroad mortgaged its franchises and property to trustees for the security of bondholders, the mortgages containing a power of sale. In 1857 the trustees applied to the supreme court for an order to sell. The mortgagors withdrew their opposition to such an order upon an agreement made by a combination of bondholders (intending to purchase at the sale), that the full value of the property should be accounted for to the mortgagors on their debts, irrespective of the price realized at the sale. In 1858 the trustees, having obtained a decree for a sale, sold the property to this combination of bondholders for much less than the real value. One of the trustees received a bribe from the purchasers to induce him to act for their interest at the sale, and he did so act. The purchasers formed themselves into a new corporation, and credited the mortgagors on their debts with only the price realized at the sale. The trustees made no return of their doings to the court. In 1859 the legislature passed an act confirming the sale. The mortgagors were ignorant of the bribery of the trustee until 1866, and did not learn until 1867 that the purchasers would not carry out their agreement to account for the real value on the debts. Upon demurrer to a bill in equity brought by the mort-

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gagors in 1866,—*Held*, that, inasmuch as the mortgagors consented to a decree ordering a sale, the property would not be restored to them upon payment of the debts; but that the sale in 1858 was invalid as against the mortgagors, and that they were entitled to relief.

The legislature has no power to confirm a fraudulent sale of the mortgaged property of a corporation.

In equity.

The questions arise upon demurrer to the bill.

The defendants are the White Mountains (New Hampshire) Railroad; the trustees under the mortgages to secure the bonds of the White Mountains Railroad; the holders of said bonds; and the Boston, Concord & Montreal Railroad, lessees of the White Mountains (N. H.) Railroad.

The allegations of the bill, which was filed August 29, 1868, are in substance as follows: In 1853, the plaintiffs issued bonds to the amount of one hundred and eighty thousand dollars, secured by mortgages to trustees of the railroad and franchises, and all the real and personal estate of the plaintiffs; the mortgages containing a power to sell in certain contingencies. By an act of the legislature of New Hampshire, approved June 27, 1857, entitled, "An act for the relief of the stockholders and creditors of the White Mountains Railroad," it was provided that the trustees to whom the railroad franchises and corporate property was mortgaged with power to sell the same, might sell the same agreeably to the terms of the mortgage deeds, provided that every such sale should be made under the direction of the supreme judicial court, which should have power to decree a sale by shares or otherwise. On December 30, 1857, the three persons, who were then by appointment trustees of said bonds, applied by petition to the supreme judicial court, praying that they might have permission to sell said

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railroad, its franchises, fixtures, and property, as provided by said mortgage deeds and by said act of the legislature; and said court, at a term thereof held on the third Tuesday of July, 1858, ordered and decreed that said trustees might sell the said railroad and franchises and property thereof conveyed to them in said mortgages, according to the provisions in said mortgages, and hold the avails of such sale to be disposed of according to the provisions of said mortgages and the order of said court. After said decree, and previous to any attempted sale of said road under said decree, Benjamin T. Reed, Ezekiel J. M. Hale, George Minot, and other persons, then representing about one hundred and sixty thousand dollars of said bonds, made an agreement in writing that said Reed, Hale and Minot, or a majority of them, for and on behalf of the subscribers to said agreement, should make a purchase of said property at the proposed sale thereof by said trustees at such price and on such terms and conditions as they might think advisable, and if such purchase should be made, should take proper steps for organizing the parties interested into a new corporation under said act of the legislature, approved June 27, 1857.

Under said agreement, said Minot was appointed an agent for the parties thereto to bid off said railroad at the proposed sale thereof by said trustees, for the benefit of the signers to said agreement. On November 3, 1858, two of trustees pretended to sell at public auction the said railroad, its franchises, and all its real and personal estate, to said George Minot, for the nominal sum of twenty-four thousand dollars, and on the said November 4, executed a deed of that date, purporting to convey said railroad and all the property mortgaged to said trustees to said George Minot; and on November 23, 1858, the said Reed, Hale, Minot and others, parties to said agreement, purporting to act in

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pursuance of said act of the legislature, organized as a body corporate and politic under the name of the White Mountains (N. H.) Railroad, and on January 31, 1859, said Minot executed a deed to said White Mountains (N. H.) Railroad of all his interest in said railroad, and all the property, real and personal, of the said White Mountains Railroad, and the said White Mountains (N. H.) Railroad immediately took possession of the said railroad and all of its personal and real estate, and used and enjoyed the same and the income thereof until February 4, 1859, when they leased the same to the said Boston, Concord & Montreal Railroad for the term of five years, at the rate of ten thousand dollars a year, and at the expiration of said lease for five years, again leased the same to the said Boston, Concord & Montreal Railroad for the term of twenty years, at the rate of twelve thousand dollars a year. The rent of said railroad was paid to said White Mountains (N. H.) Railroad semi-annually by the said Boston, Concord & Montreal Railroad, according to the terms of said leases, and by said White Mountains (N. H.) Railroad paid out in the purchase of certain of said bonds as hereinafter described, and in semi-annual dividends to its stockholders. The capital stock of said White Mountains (N. H.) Railroad was fixed at two hundred thousand dollars, and was distributed among the bondholders who signed said agreement, each bondholder receiving such a proportion of the stock as his bonds bore to the whole amount held by the signers to said agreement. There was no subscription to stock in said White Mountains (N. H.) Railroad, and no one paid anything for said stock, but received his stock by virtue of being a holder of said bonds, and no one held any stock in said road except by reason of his being a holder of said bonds, except one of said trustees, who did hold at the time of the issue of said stock and now holds five thousand dol-

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lars of said stock without having the corresponding amount of bonds as stated hereinafter. The trustees made no return of their proceedings to the court; and no decree was ever made by the court confirming or sanctioning their doings. Said pretended sale is alleged to be utterly null and void, as to the plaintiffs, for various reasons which are specified.

The sixth reason is, in substance, as follows: Because the said Reed, Hale, and Minot, who were, under said agreement, the agents for said purchasers, in order to induce one of the trustees to consent to said sale, and to act at said sale for the interest of said purchasers, corruptly and fraudulently agreed with said trustee that if he would thus consent and act for their interest at said sale, he should receive as a consideration for said service the sum of five thousand dollars in the capital stock of the White Mountains (N. H.) Railroad. And the plaintiffs say that said trustee did at said sale act for the interest of said purchasers and in fraud of the plaintiff's rights, and did endeavor to stifle and prevent competition at said sale, and by his own advice, suggestions, and interposition, cause said road and property to be struck off and sold to said Minot at the nominal sum aforesaid, and with intent and for the purpose of sharing and participating for himself and others in the benefit of said purchase; and to carry out said corrupt and fraudulent agreement said Reed, Minot, and Hale afterwards allowed said trustee to have and receive said five thousand dollars in stock, and said Reed as president, and said Minot as treasurer, of said White Mountains (N. H.) Railroad, signed the certificate or certificates of said stock and delivered the same to the said trustee, who has received the dividends and income thereof ever since, paying nothing therefor except the service as aforesaid. The railroad and property sold as aforesaid for the sum of twenty-four thousand dollars was at the

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time of said sale and is now of the value of two hundred thousand dollars or more ; and the market value of the stock of said White Mountains (N. H.) Railroad is one hundred dollars a share. Several of the bondholders and signers of said agreement, who held the bonds only as collateral security, had other security for their claims in the shape of notes signed by various sureties. Said bondholders have credited plaintiffs with a payment by reason of said sale of only seven dollars and seventy-five cents per each one hundred dollars of debt, and they now hold executions against various of said sureties, obtained on the notes signed by them ; and one of said bondholders threatens to collect the executions now outstanding in his favor. The plaintiffs say that they did not protest against said sale and object to the possession of the property by the purchasers under said sale, because prior to the decree of sale the plaintiffs and certain sureties of the plaintiffs being opposed to said decree, and any sale under it, for fear said property might be sold at a sum much less than its full value, it was understood and agreed between them and those who subsequently became the purchasers of the property, that if such opposition should be withdrawn, such sale made, and possession of the property obtained under said sale, its full value should be accounted for to the plaintiffs on their debts ; that is to say, that the bonds sold and delivered to *bona fide* purchasers as aforesaid should be canceled, and that the security of the plaintiffs in said pledged bonds should not be impaired by said sale and possession of said property by the purchasers, but that the interests of the plaintiffs in said pledged bonds should be fully protected, whether said road and property sold at a nominal sum or at its full value. Nor did the plaintiffs learn until June, 1867, that said purchasers had allowed them as the proceeds of said sale only the small sum of seven dollars and seventy-five cents on

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each one hundred dollars of said bonds as aforesaid ; and then for the first time learned that said purchasers would not carry out said agreement, and would not allow the plaintiffs any more than said seven dollars and seventy-five cents on each one hundred dollars of said bonds. And the plaintiffs were also ignorant of the fraudulent character of said sale, as before alleged, until August, 1866. And the plaintiffs allege that the possession and control of said railroad and property, real and personal, included in said mortgages, by said White Mountains (N. H.) Railroad corporation, and the Boston, Concord, and Montreal Railroad corporation, as aforesaid, is altogether wrongful and contrary to equity and good conscience. They therefore pray that an accounting may be had between the plaintiffs and the said last mentioned railroad corporations, and between the plaintiffs and all the holders of said bonds, and any others interested in said purchase as aforesaid ; and that said railroad and property be restored to the plaintiffs upon such terms as to this court shall seem to be just and proper. And the plaintiffs say that they have not brought into court said sum of twenty-four thousand dollars for which said road and property was bid off at said pretended sale, nor any sum to be returned to said purchasers, because said purchasers did not pay said twenty-four thousand dollars to said trustees, but only a small part of the same, and what part the plaintiffs are unable to state, but are ready and willing and offer to pay in that behalf any sum that the court shall order. And the plaintiffs allege as a further reason why no money is brought into court to be returned to said purchasers that they have received out of the income of said road and property a much larger sum than they paid for the property itself. And the plaintiffs allege that they are ready and willing and offer to pay all just debts that may be found due from them upon said accounting to said Reed, Hale, and

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others who hold said bonds in pledge as security for their claims, and to any other persons or corporations, such sums of money as the court may order them to pay upon the restoration to the plaintiffs of said road and property. And the plaintiffs pray for such other relief as may be just.

C. W. & E. D. Rand, for plaintiffs.

H. Hibbard and Minot, for defendants.

SMITH, J.*—The statute of 1857 authorizing a sale, provided that "the White Mountains Railroad shall exist as a corporation so long as may be necessary after such sale, for the purpose of settling its affairs and for no other purpose."

It is urged that under this statute the old corporation must be regarded as substantially extinguished by the sale and the subsequent proceedings; and that this bill is, in effect, for the dissolution of the new corporation; a result not attainable in this suit, but only by a proceeding in behalf of and in the name of the State. We need not inquire whether the existence of the old corporation is not admitted by the demurrer; for the statute of 1857 will not bear the construction put upon it by the defendants. That act had no effect to terminate the existence of the old corporation except after a *legal and valid* sale. If no such sale has taken place, the act does not apply.

The dissolution of the new corporation is not an object directly aimed at by the bill. If dissolution should seem likely to be the indirect result of compelling the new corporation to give up property acquired by fraud, such a contingency would afford no bar to a prosecution of the ordinary remedies against the new corporation by all parties interested in the property so

* BELLOWS, Ch. J., and FOSTER, J., did not sit.

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acquired. In the language of plaintiff's counsel, "The position of the defendants is, virtually, that if a corporation acquires property by fraud, the court, before they make a decree to restore the property, must stop to inquire what effect such a restoration would have upon the charter of the corporation, and its capacity afterward to do business. As well might the court stop to inquire what effect the restoration of stolen goods to the owner would have upon the business prospects of the thief. A corporation is not privileged to acquire property by fraud, any more than an individual."

It is unnecessary to consider the sufficiency of *all* the reasons urged against the validity of the sale; for the sixth reason, alleging the bribery of one of the trustees, and his fraudulent collusion with the purchasers, alone and of itself, affords ample ground for declaring the sale invalid as against the plaintiffs, unless their right to object has been in some manner barred.

The defendants strenuously contend that the plaintiffs are barred by their acquiescence, or waiver, at the time; and also by their long delay in commencing this proceeding.

The bill admits that the plaintiffs withdrew their opposition to a decree of sale, in consideration of an agreement by those who afterwards purchased at the sale that the full value of the property should be accounted for to the plaintiffs, whether it sold at a nominal sum or for full value. The failure of the purchasers to perform this agreement does not restore the plaintiffs to the position they occupied before the decree of sale, nor authorize them to revoke their own action and contest the validity of a decree to which they once substantially assented. If the plaintiffs have any remedy for the damage occasioned them by that decree, it must be by suit against the purchasers on

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their contract. Our conclusion on this point is, that the decree ordering a sale under the mortgages cannot be rescinded; and that, consequently, the prayer for restoration of the property, or, in other words, for redemption, must be denied.

But it by no means follows that the sale which was professedly made under that decree is to stand. It was not such a sale as was contemplated in the decree of the court, or in the act of 1857. The plaintiffs only acquiesced in a decree that a legal and valid sale should be made. They did not assent to fraudulent collusion between the trustees and the purchasers. Undoubtedly they contemplated the possibility that the property might sell for much less than its real value, for they took measures to guard against damage from such a result by obtaining the above-mentioned agreement from the purchasers. Indeed, the plaintiffs' conduct, in taking this security from the purchasers, and in delaying to commence this proceeding till they had discovered not only the fraud but the breach of contract, affords some ground for the inference that after the purchasers made the above agreement it was a matter of comparative indifference to the plaintiffs whether the property sold for full value or not. Still, the plaintiffs never assented to the use of improper means to reduce the price; and it is not inconceivable that the plaintiffs might have been willing to trust the purchasers to make up the difference between the price realized at a fair sale and the actual value of the plaintiffs' interests, but not willing to trust them to make up the difference between the price realized at a fraudulent sale and the actual value.

Upon the whole, we think that there has been no such acquiescence on the plaintiffs' part in the fraudulent sale as should bar their right to object: and that they have exercised their right within a reasonable time after discovering that there was fraud, and that

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they had been damnified by it. Upon the allegations of the bill no laches can be imputed to them on account of the years which elapsed after the sale before the discovery of the fraud.

The defendants rely on the statute of 1859 (chap. 2297), entitled "An act to incorporate and establish the White Mountains (N. H.) Railroad." Section 2 enacts that the railroad, corporate property, rights, and franchises of said corporation shall consist of the railroad, property, rights, and franchises of the late White Mountains Railroad, incorporated December 25, 1848, which are described and conveyed in the mortgages of the said late White Mountains Railroad, executed on February 19, 1853, and on December 17, 1853, and are also described and conveyed in the deed of the trustees under said mortgages to George Minot, dated November 4, 1858, which said mortgages and deed of said trustees are hereby ratified, confirmed, and made valid; and said White Mountains (N. H.) Railroad are hereby authorized to maintain the railroad described in said mortgages and deed from . . . Haverhill to . . . Littleton, as heretofore constructed and established . . .

Section 7 enacts that the agreement of said corporation with the Boston, Concord, and Montreal Railroad, dated February 4, 1859, relative to running the road of this corporation, is hereby approved, ratified, and confirmed; and this corporation is fully invested with all the powers and privileges, franchises and immunities, granted to and conferred upon the late White Mountains Railroad by its act of incorporation, approved December 25, 1848.

It would not be unreasonable to presume that the legislature were ignorant of the fraudulent character of the sale, and, by confirming the sale, intended only to relieve the purchasers from the consequences of mistakes or formal defects.

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But whatever knowledge or intention they may have had, the statute cannot operate to prevent the plaintiffs from invalidating the sale by proof of fraud. Such a result is beyond the power of the legislature. It does not come within the principle of that class of cases (decided in other States) in which a legislature has been held to have the power to confirm, by retroactive laws, the acts of public officers who have exceeded or imperfectly executed their authority ; or to cure defects in conveyances. Statutes of this kind "are of a purely remedial nature ;" their purpose being to correct mistakes in order that the intention of the parties may be carried out. The legal rights affected by such statutes are "deemed to have been vested subject to the equity existing against them ;" and the statutes accomplish only what, upon principles of natural justice, a court of equity ought to have power to decree. Such legislation has been held valid "when clearly just and reasonable, and conducive to the general welfare ;" "but the cases," says Chancellor KENT, "cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principles. 1 *Kent Com.* 456. In this instance the statute of 1859, if it cures the fraud in the sale, goes far beyond the correction of mistakes, or the remedying of formal defects ; and is not only open to objection as a retrospective law, but also as an act of a judicial nature. Could the legislature before the sale have passed an act authorizing one of the trustees to receive a bribe from the purchasers ? If not, how can their subsequent confirmation have greater efficacy than their previous authorization ? "The healing statute must in all cases be confined to validating acts which the legislature might previously have authorized. It cannot make good retrospectively, acts which it had previously no power to permit." *Cooley's Constitutional Limitations on Legislative Power*, 381, 382. It

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is unnecessary to consider at this time whether the class of cases referred to can be regarded as authority in this State, where the constitution expressly prohibits retrospective legislation.

What, if any, measures should be taken to protect subsequent *bona fide* purchasers of stock in the new corporation, is a question which can be considered hereafter, if it should appear that there are any such parties. Upon the allegations of the bill, the plaintiffs are entitled to some relief. Whether the auction sale should be annulled and a resale ordered, or the purchasers be compelled to account for the property at a fair price, or whether relief should be granted in some other manner, need not be determined.

Demurrer overruled.

WHITE MOUNTAINS RAILROAD v. BAY
STATE IRON COMPANY.

(50 *New Hampshire*, 57.)

Redemption of pledges. A bill in equity may be maintained to redeem a pledge, if an account is wanted, or if there has been an assignment of the pledge.

The pledgors of bonds secured by mortgages may redeem the bonds after the lapse of fifteen years, notwithstanding the pledgee has foreclosed the mortgages.

In equity.

The questions arise upon demurrer to the bill,

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brought by White Mountains Railroad against Bay State Iron Company and B. T. Reed.

The bill alleges, in substance, that on the 10th day of May, 1853, the plaintiffs were indebted to the Bay State Iron Company in a large sum, which was at first represented by notes; that one of said notes, for five thousand eight hundred and eighty-one dollars and fifty-two cents, was executed for the purpose of paying and taking up a note, already in the hands of the Bay State Iron Company, for the sum of five thousand seven hundred and ninety dollars and thirty-six cents, which had become due, and that said company retained both of said notes, though entitled to only one of them; that the said railroad paid the Bay State Iron Company, in December, 1854, and January, 1855, three thousand eight hundred and twenty-five dollars on said notes, which has never been accounted for to said railroad, by said Bay State Iron Company, or by said Reed; that there was due on said debt, on the 18th day of May, twenty-four thousand two hundred and ninety-five dollars and eighty-three cents, and no more; that said debt is now represented by executions: One in favor of B. T. Reed against the White Mountains Railroad and certain sureties of said railroad, for . \$11,359.77

One in favor of said Bay State Iron Company	
against said railroad, for	19,725.77
Nine in favor of said Bay State Iron Com-	
pany against the individual sureties and	
indorsers of said railroad, for	80,275.93

 \$111,361.30

Interest to May 18, 1868, added	75,429.50
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Makes full amount of executions,	\$186,790.80
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Adding said note for \$5,790.36, and interest	
to May, 18, 1868,	\$10,460.17

Full amount of Reed's nominal claim,	\$197,250.97
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that bonds were pledged to secure the debt to the said Bay State Iron Company, thirty-three thousand two hundred dollars of which still remain in Reed's hands ; that these bonds, being in all one hundred and eighty thousand dollars, were secured by mortgages, to trustees, of all the property and franchises of said railroad ; that the debt to the Bay State Iron Company, and the bonds to secure it, were assigned to the said Reed, February 27, 1857 ; that neither the Bay State Iron Company, nor Reed, have ever, by sale or otherwise, made the said collateral security their own property, or done anything in any way to impair the right of said railroad to redeem said collateral security ; that an act of the legislature was passed June 27, 1857, allowing said trustees to sell said railroad, and whatever property was mortgaged to them, under the direction of the supreme court ; that Ira Goodall, Daniel Patterson, and Stephen Kenrick, who were then trustees, obtained a decree of said court for such sale on the third Tuesday of July, 1858 ; that two of said trustees, viz : Patterson and Kenrick, undertook to sell the said railroad, and all the property mortgaged, to George Minot, at auction, on the third day of November, 1858, for the sum of twenty-four thousand dollars ; that said road and property were really purchased by a combination of bondholders (of whom said Reed was one), under a written agreement, making the said George Minot their agent for that purpose ; that the purchasers took possession of the property, formed themselves into a corporation, under the name of the White Mountains (N. H.) Railroad, each receiving stock in said road according to the amount of bonds he held ; that said Reed, by virtue of the bonds held by him as collateral security, received forty-one thousand eight hundred dollars of said stock, and still holds the same ; that the validity of said sale is neither admitted nor denied, but it is denied that it is in any way effective

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to release said Reed from the obligation to the said White Mountains Railroad to hold to hold said bonds and stock as collateral security for the payment of his claim against said railroad; that said bonds and said stock are still held by said Reed as collateral security as aforesaid, and that said railroad has a right to redeem the same; that said Reed expressly agreed with the said plaintiffs, previous to said sale, upon good consideration, that the security, in said bonds held by him, should not be impaired, and that the interests of said road should be fully protected, whether said road should be sold at a nominal price, or its full value; that said property sold for twenty-four thousand dollars, when it was worth two hundred thousand dollars; that the sale, and the proceedings under it, did not conform to the decree of the court allowing the sale, or the provisions of the mortgages; that the purchase money of said sale was never paid to the trustees, but only the expenses of the trust; that said Reed paid one thousand six hundred and fifty dollars as his share of the expenses of the trust and the expenses of organizing the new corporation, and no more, but received stock in the new corporation of the value of forty-one thousand eight hundred dollars; that said Reed obtained said stock wholly by reason of holding said bonds as collateral security, and though said stock exceeds in value any just claim of said Reed against said road the sum of seventeen thousand five hundred and four dollars and seventeen cents, yet said Reed holds all of said executions against said road, its sureties and indorsers, not reversed, annulled, or in any part satisfied, and claims that they are valid and just debts against the railroad, its sureties, and indorsers; that he also claims that he has only received on his debt two thousand five hundred and fifty-seven dollars and fifty cents, and that he has indorsed this, not on his executions, but on said bonds; that on May

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18, 1868, the president and treasurer of said railroad offered to pay said Reed all that was due him from said White Mountains Railroad, and any proper claim that he had against said road, and requested him to deliver to them, upon such payment, said executions, and all claims held by him against said road, and said bonds and said stock of said White Mountains (N. H.) Railroad, but that said Reed refused to accept said offer or in any manner to accede to said request. The bill then prays for an injunction, and for an accounting between the plaintiffs and said Reed, and that, upon the payment of the sum of twenty-four thousand two hundred and ninety-five dollars and eighty-three cents, or such sum as shall be found his due, he may be decreed to deliver up to the plaintiffs all of said executions, and said note of five thousand seven hundred and ninety dollars and thirty-six cents to be canceled, and also all of said bonds, and that he be ordered to transfer legally to the plaintiffs said stock.

The plaintiffs offer to bring into court, to be paid to said Reed, said sum of twenty-four thousand two hundred and ninety-five dollars and eighty-three cents, or any sum that the court shall decree to be due to said Reed.

C. W. & E. D. Rand, H. & G. A. Bingham, Farr & Son, for plaintiffs.

Hibbard, and Carpenter, for defendants.

SMITH, J.*—The defendants say that the plaintiffs have a plain and adequate remedy at law; being entitled to maintain trover after an improper sale by the pledgees, or after tendering the debt and demanding the pledge.

* BELLOWS, Ch. J., and FOSTER, J., did not sit.

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But the existence of a legal remedy is not necessarily decisive against equitable jurisdiction; and, in the present case, we think a bill in equity may be maintained. However the rule may be in ordinary cases of pledge, there is authority for sustaining a bill to redeem where an account is wanted, or where there has been an assignment of the pledge. *Story Eq.* § 1032; *Hasbrouck v. Vandervoort*, 4 *Sandf.* 74; *Kemp v. Westbrook*, 1 *Ves. Sr.* 278; see, also, *De-mainbray v. Metcalfe*, 2 *Vernon*, 691, 698; *Vanderzee v. Willes*, 3 *Brown Ch.* 21; *Kent, Ch.*, in *Hart v. Ten Eyck*, 2 *Johns. Ch.* 62, 100. The case of *Brown v. Runals*, 14 *Wis.* 693, seems to go further than these authorities, or than the plaintiffs require to go in this case.

The defendants contend that, upon the allegations of the bill, the plaintiffs are not entitled to any relief. This position cannot be sustained. A failure to pay the debt at maturity does not vest the property in the pledge in the pledgee. The pledgee's possession is not regarded as adverse to the pledgor, and does not bar his right to redeem unless it has continued for so long a time as to raise a presumption that the pledgor has relinquished his title in satisfaction of the debt. If the pledgee does not choose to exercise, in a proper manner, his acknowledged right to sell, he still retains the property as a pledge, and the pledgor's right to redeem continues. See *Story on Bailments*, §§ 346, 348; *Story on Eq.* § 1032; 2 *Kent Com.* 581-2; *Kemp v. Westbrook*, 1 *Ves. Sr.* 278; *Com. Dig.* title "Mortgage by Pledge of Goods, B;" *Walter v. Smith*, 5 *B. & Ald.* 439; *Cortelyou v. Lansing*, 2 *Caines' Cases in Error*, 199. In the present case there has been no sale of the pledged property. The bonds, not the mortgages, were the property pledged. The mortgages were mere incidents

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to the bonds secured by them, and a sale of the mortgaged property was not a sale of the bonds.

If the sale was valid, Reed holds whatever he has realized thereby on the same terms as he held the bonds. If the sale was invalid, it may be that Reed must account for whatever he has received under it to the trustees of the mortgages, that they may apply it for the benefit of all parties secured by those mortgages. Upon the receipt of his debt, Reed is bound to restore to the plaintiffs the bonds, and also all the avails of the bonds except such portion as he may be under a paramount liability to account for in some other quarter.

Demurrer overruled.

NORTHERN RAILROAD v. CONCORD RAILROAD.

50 *New Hampshire*, 166.

Validity of contract to control management of corporation.—The Northern Railroad brought a bill in equity against the Concord Railroad to enforce a contract made by a former board of directors of the Concord Railroad, substantially transferring the management of the Concord Railroad to the Northern Railroad for the term of five years. Upon the evidence a majority of the court found that the controlling purpose of the directors of the Concord Railroad in making the contract, was to prevent the management of the road from passing into the hands of a new board of directors whose election at the next annual meeting was generally anticipated; and that this purpose was known to the Northern Railroad. On this state of facts a majority of the court *Held*, that the contract was invalid because of the purpose for which it was made.

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In this case it was *Held* by SARGENT, J., and SMITH, J., that there was not such reason to apprehend a perversion of the trust by the newly elected directors of the Concord Railroad as would justify the court in withholding from them the control of any portion of the corporate affairs, except certain pending suits which the new board had already been expressly enjoined from controlling.

In equity, upon a hearing on the merits, the court were equally divided on the question whether the bill should be dismissed. *Held*, that no judgment could be entered, that the cause remained pending, and that receivers, who had been appointed to hold the property during the pendency of the suit, would remain in possession.

In equity.

Bill brought by the Northern Railroad against the Concord Railroad Corporation, and against Isaac Spalding, Frederick Smyth, John H. Pearson, James W. Johnson, Edson Hill, William R. Spalding, and William A. Tower, described as "directors of said Concord Railroad Corporation."

The bill alleges, among other things, that on April 29, 1870, for the purpose of providing for a more efficient, convenient, and economical management of the business of the said Concord Railroad and said Northern Railroad, for the benefit of the public in better accommodation and with less rates of fares and freights, as well as to promote the interests of said parties respectively, a business contract in writing, under their respective corporate seals, was duly made and entered into between said Concord Railroad and the plaintiff, a copy whereof was annexed and made a part of the bill; whereby, among other things, it was mutually agreed by and between said parties, that the roads of said parties respectively from Concord to Nashua and from Concord to Bristol and White River Junction, together with the Suncook Valley road, the Concord and Portsmouth road, the Manchester and North Weare road, and the Hooksett branch road, so far and so long as said Concord Railroad Corporation

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had or might have any interest in and right of control over any of said last mentioned roads, should, for the term of five years from and after April 15, 1870, be operated and managed in connection with each other, under the name and style of the Concord and Northern Railroads, by a joint management under the charge, direction, and care of one agent, acting for and as the agent of both and each of said parties, who should be appointed by said Northern Railroad and be removable by them, but subject to the control of the boards of directors of both the contracting parties by concurrent votes, each board acting by itself as is usual with boards of railroad directors in ordinary cases; and that the roads of the contracting parties, and the other roads before mentioned, together with all the lands used in connection therewith, and the privileges and appurtenances thereto belonging, with the rights and franchises of said roads respectively, all the depots, shops, and other buildings, and all fixtures on said roads and lands used for the purposes of said roads, all the furniture, machinery, and fixtures in use in said depots, shops, and other buildings, all the engines, cars, tools, shop stock, materials for repairs, wood, oil, and other articles of property on hand belonging to either of the contracting parties intended for the purposes of said roads, and all other property and premises belonging to either of the contracting parties, except the premises in said Concord, at the corner of Freight and Main streets, under written lease to Harvey and others, should be placed in the possession and be and remain subject to the control of said joint management, for the uses and purposes thereof, during the continuance of of said contract.

That, subsequently, the said contract was sanctioned in writing by the railroad commissioners for said State, and approved by the governor and council thereof, in accordance with the requirements of law; and

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thereafterward Onslow Stearns was duly appointed by the plaintiff, with the concurrence and assent of said Concord Railroad, the sole agent to assume and exercise the charge, care, direction, and control of the joint management of the respective roads of the contracting parties and of the other roads aforesaid, and accepted the trust confided to him; and thereupon the contracting parties, in accordance with the provisions of said contract, placed in the possession and delivered over to said Stearns, sole agent for the joint management aforesaid, for the purposes of said management, all the aforesaid roads, and all other property and premises belonging to either of the contracting parties, except the premises at the corner of Freight and Main streets in said Concord as aforesaid, to hold and enjoy, manage and control the same, for the purposes of said joint management only. . . .

The bill further avers, that before April 29, 1870, as plaintiff is informed and believes, the said Isaac Spalding, Frederick Smyth, John H. Pearson, James W. Johnson, Edson Hill, William R. Spalding, and William A. Tower, associating, confederating, and combining together, and with sundry other persons, to the plaintiff unknown, to obtain the control of said Concord Railroad, by purchasing, with money borrowed from savings banks under their control, and other sources, sufficient capital stock of said corporation to secure their own election by their own votes as directors thereof, for the purpose of so controlling the business of the road of said corporation and that of the other roads aforesaid connected therewith, by their action as directors in regulating the tariff for freight and passengers thereon, by dismissing or discharging pending suits in favor of said corporation against some of their associates, former conductors on some of said roads, and otherwise, that the public should be compelled to pay such fares as would accumulate, from

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the future earnings of said roads, a surplus sufficient to enable them to declare and pay extra dividends to themselves until the aggregate dividends on the stock of said corporation should average ten per cent. per annum from the date when it was paid into the treasury, and for the further purpose of procuring such legislation and making such arrangements as should enable such Concord Railroad successfully to consolidate its stock with that of other roads between Boston, Mass., and Ogdensburgh, N. Y., at double its par value, thus giving to each of them two dollars' worth of stock in the consolidated corporation for every dollar's worth owned by them in the Concord Railroad, and compelling the traveling and business community to pay ample dividends on this doubled capital, had purchased a large amount of the capital stock of said Concord Railroad, with the designs and for the purposes aforesaid; and after the making of said contract, said Spalding and others, and their associates and confederates as aforesaid, regarding its existence and fulfillment as an effectual barrier to the present consummation of their schemes for profit and gain, redoubled their previous efforts in the purchase of the stock of said Concord Railroad, with the avowed design of breaking up and preventing the execution of said contract; and, so successful were they in purchasing stock and procuring proxies, that they were able to control the annual meeting of said corporation, holden at Phenix Hall, in said Concord, on May 24, 1870, elect themselves directors of said corporation by votes thrown by themselves, pass resolutions repudiating, denouncing, and setting aside, as wholly unauthorized, in violation of their rights as stockholders, illegal, null, and void, the aforesaid contract of April 29, 1870, and instructing themselves to "adopt such measures as in their judgment may be deemed expedient to assert and maintain the rights of the stock-

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holders to the road and other property" of said corporation.

The bill further alleges, that the said Isaac Spaulding and others, directors of said Concord Railroad, openly avow their intention to prevent the fulfillment and execution of said contract on the part of said corporation, and have demanded of said Onslow Stearns, agent for the joint management provided for in said contract, possession of said road of the Concord Railroad and of said connecting roads, and of all the property placed under his control, as such agent, by the Concord Railroad, agreeably to the provisions of said contract; and the plaintiff further says, that it is informed and believes that said Isaac Spaulding and others, directors as aforesaid, have openly avowed their purpose to treat said contract as utterly null and void, and have threatened and do still threaten to wrest the road of said Concord Railroad and said other connecting roads, with all property belonging to said Concord Railroad and to said connecting roads, *by force and violence*, from the possession and control of said Onslow Stearns, sole agent for the joint management provided for in said contract, and themselves to assume the management and control of all said roads and property, with a view to the accomplishment of the speculative purposes for which they purchased the capital stock of said Concord Railroad, and in express violation of the covenants and agreements on the part of said Concord Railroad in said contract contained; and said Isaac Spaulding and others, directors aforesaid, utterly refuse to carry out and perform the provisions and stipulations of said contract on the part of said corporation and on their own part.

And the plaintiff further says, that had they not been restrained by temporary injunction, said Isaac Spaulding and others, directors aforesaid, would, in its belief, soon after their election as directors, have car-

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ried their threats into execution, and wrested, or have attempted to wrest, *by force and violence*, from the possession and control of said Stearns, agent as aforesaid for the joint management under the contract of April 29, 1870, the road of said Concord Railroad, and its connecting roads as aforesaid, with all the other property aforesaid, and the plaintiff fears and verily believes that, if not continually hereafter so restrained, they will at once carry or attempt to carry said threats into execution in like manner, to the great and irreparable injury of the plaintiff.

Wherefore, inasmuch as it can have adequate relief in the premises only in a court of equity, the plaintiff prays that the defendants may be required severally to answer all and singular the foregoing allegations, charges, and complaints, as fully and particularly as if the same were here repeated and they were each specially interrogated in relation thereto; . . . that said contract of April 29, 1870, may be decreed to be valid and binding upon the defendants, and that they may be decreed specifically to fulfill and perform the same agreeably to its terms and provisions; and, to prevent injustice and great and irreparable injury to the plaintiff, that a writ of injunction may be issued to restrain the defendants, and all officers, agents, and others acting under their authority, and all other persons, from interfering in any way whatever, with the possession and control of the road of said Concord Railroad, said Suncook Valley road, the Concord and Portsmouth road, the Manchester and North Weare road, and the Hooksett branch road, or with the possession and control of the other property of said Concord Railroad, or belonging to any of said other roads, during the continuance of said contract of April 29, 1870, by said Onslow Stearns, agent for the joint management provided for in said contract, or by his successor or successors in that office or trust; and that

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such other and further relief may be granted to the plaintiff as may seem just and equitable.

The bill was filed May 30, 1870. August 17, 1870, the plaintiff amended the bill by inserting the following allegations:

"The plaintiff further says, that the said Isaac Spalding, Frederick Smyth, John H. Pearson, James W. Johnson, Edson Hill, William R. Spalding, and William A. Tower, at the time said scheme was devised for obtaining control of said Concord Railroad, were the owners of but a small amount of stock in said corporation; nor did they then, or at any time afterwards, have on hand but a small part of the money necessary for carrying out said scheme, without borrowing the same; nor did they then, or at any time afterwards, have any considerable amount of money which they had occasion to invest; nor did they consider said stock, nor was it in fact a good investment at the prices paid for the same, unless it should be made so by some means other than the payment of proper and legitimate dividends thereon; but the said Isaac Spalding, Frederick Smyth, John H. Pearson, James W. Johnson, Edson Hill, William R. Spalding, and William A. Tower, associating, confederating, and combining with Moody Currier of Manchester in the county of Hillsborough, Anson S. Marshall of Concord in the county of Merrimack, John A. Spalding and Edward H. Spalding, both of Nashua in said county of Hillsborough, Reed P. Silver, Joseph B. Clark and Charles Williams, all of said Manchester, Natt Head of Hooksett in said county of Merrimack, and others to the plaintiff unknown (it being understood and agreed that if the said scheme should be successful the said Moody Currier was to be elected treasurer and the said Anson S. Marshall clerk of said corporation, and that the said Isaac Spalding would soon voluntarily cease to hold the office of director, and that the said John A. Spald-

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ing was to be elected in his place), made use, in violation of law, of money belonging to, or borrowed, in violation of law, from the Merrimack River Savings Bank, located at said Manchester, and under the control of said Frederick Smyth, who was treasurer and a trustee thereof, the said Charles Williams being also a trustee; from the First National Bank, located at said Manchester, and also under the control of said Frederick Smyth, who was cashier thereof, the said Joseph B. Clark and Natt Head being directors thereof; from the Amoskeag Savings Bank, located at said Manchester, and under the control of said Moody Currier, who was president and treasurer thereof; from the Amoskeag National Bank, located at said Manchester, and also under the control of said Moody Currier, who was president and a director thereof, the said Edson Hill and Reed P. Silver being also directors; from the City Savings Bank, located at said Nashua, and under the control of said Edward H. Spalding and John A. Spalding, relatives of the said Isaac Spalding and William R. Spalding, the said Edward H. Spalding being treasurer and the said John A. Spalding a trustee thereof; from the First National Bank, located at said Nashua, and under the control of said John A. Spalding and Edward H. Spalding, the said John A. Spalding being cashier and the said Edward H. Spalding a director thereof; from the National Savings Bank, located at said Concord, of which the said John H. Pearson, James W. Johnson, and Anson S. Marshall were trustees; from the First National Bank, located at said Concord, of which the said James W. Johnson was a director; and from other savings and national banks to the plaintiff unknown.

“And the plaintiff further says, that the defendants, confederating and combining as aforesaid, and for the purpose set forth in the plaintiff's bill, unlawfully procured a large number of votes to be cast for them as

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directors at said annual meeting, by persons who were not *bona fide* holders of stock in said corporation and who had no right to vote at said meeting, as the defendants then and there well knew, and by others who were *bona fide* stockholders therein, but who were induced by the defendants, and their associates and confederates, to vote for the defendants by corrupt considerations.

“And the plaintiff further says, that the aforesaid combination, and the purchasing of stock and procuring of proxies in pursuance thereof, for the purposes aforesaid, and all the votes cast on said stock by the defendants and their associates and confederates, at the annual meeting of said corporation held on the 24th day of May, 1870, were unlawful; that the defendants were not legally elected directors of said corporation at said meeting, nor were the resolutions referred to in said bill legally passed, and that all the subsequent acts of said directors as such were and are void and of no effect.”

The amended answers of the various defendants allege, that no business contract, in writing, was duly made and entered into between the said Concord Railroad and the said Northern Railroad, under their respective corporate seals, on the 29th day of April, 1870, as set forth in the bill, but the contract referred to in said bill was made and entered into by the directors of said corporations, for the time being, in the names of said corporations, without the authority of said corporations or their charters or other law, or any authority whatsoever, and is invalid and of no effect; that said contract was not made by said directors as aforesaid for the purpose of providing for a more efficient, convenient, and economical management of the business of said Concord Railroad and said Northern Railroad, nor for the benefit of the public in better accommodations and with less rates of fares and freights,

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nor to promote the interests of said corporations respectively ; but was fraudulently made, with the intention by the parties thereto to defraud the said Concord Railroad and the public, and to prevent the stockholders of said Concord Railroad from managing and controlling its property and business by their directors, thereafterwards to be chosen ; that said contract was one which could not be rendered valid and binding upon the plaintiff and the said Concord Railroad, by the sanction, in writing, of the railroad commissioners of said State, and the approval of the governor and council of said State, or either of such acts ; that, even if said contract was one that could be rendered valid and binding in this manner, it was not so sanctioned by said railroad commissioners, nor approved by the governor and council, in accordance with the requirements of law, and for these reasons also is invalid and of no effect. . . .

And the defendants further say, that the stockholders of said Concord Railroad, at their annual meeting aforesaid, did pass resolutions wherein they condemn the official action of their former president and directors, in reference to the contract aforesaid, and set aside the said action as wholly unauthorized and illegal, and in violation of the rights of said stockholders and the public, and pronounce the same null and void, and instruct their board of directors, that day chosen as aforesaid, to adopt such measures as in their judgment may be deemed expedient to assert and maintain the rights of the stockholders to the road and other property of said Concord Railroad ; but the defendants deny that said Isaac Spalding and others, directors as aforesaid, have threatened and do still threaten to wrest the road of said Concord Railroad and said other connecting roads and its other property aforesaid from the possession or control of the said Stearns by any improper or unlawful force ; or that

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they would have so done, or attempted to so do, soon after their election as directors, had they not been restrained by said temporary injunction; or that they will attempt to do so, by the use of improper or unlawful force in the future, unless restrained by injunction from so doing; or that they would assume the management or control of all said roads and property, or any portion thereof, with the view to the accomplishment of any speculative purposes whatsoever.

The answers further allege, that Onslow Stearns, president of the Northern Railroad, Josiah Minot, president (until May 24, 1870) of the Concord Railroad, and other persons, had formed a plan to consolidate the Concord Railroad and the Northern Railroad with other railroads; that the said Isaac Spalding, Frederick Smyth, John H. Pearson, James W. Johnson, Edson Hill, William R. Spalding, William A. Tower, Moody Currier, Anson S. Marshall, Edward H. Spalding, Reed P. Silver, Joseph B. Clark, Charles Williams, Natt Head (all of whom, except said Tower and William R. Spalding, were citizens and residents of the State of New Hampshire, and, with their friends and relatives and neighbors, interested as stockholders and in business relations in the management of the said Concord Railroad), were justly apprehensive that, through the power and influence of the said Onslow Stearns, Josiah Minot, and their associates, as aforesaid, the said Concord Railroad would be brought into said consolidation, to the great detriment of all good citizens of the State of New Hampshire, and were also desirous of effecting a reduction in the rates of local fare and freight upon said Concord Railroad, which they believed to be unreasonable and disproportionately high, and were also desirous of effecting a reduction of the expenses of said corporation, and economy in the administration of its affairs, and for these and other lawful objects, were desirous of

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effecting a change in the directors and officers of said Concord Railroad ; and being, most of them, already the owners of stock in the said railroad, and some of them to a large amount and long standing, they, in February and March, 1870, co-operated with each other, and with divers other good citizens of the State of New Hampshire, in becoming the owners of stock, and using their influence, by the use of proper means, with a view of obtaining such a number of shares in said Concord Railroad as should enable them to accomplish their lawful purposes aforesaid ; and in the purchase of said stock, although they bought more stock than they would have purchased if their object had been investment simply, they paid no more for it than they believed it would be worth with proper management of the road, and no more than was paid by the said Josiah Minot and his associates, who also made strenuous efforts, by purchasing stock and by other means, to prevent the accomplishment of the purposes aforesaid ; and although the persons named in the plaintiff's bill, in the prosecution of their aforesaid object, or some of them, hired money of the savings banks mentioned in said bill, as they lawfully might, it was not borrowed or applied in violation of any law, official duty, or trust ; nor did said defendants, or any of them, procure any votes to be cast for directors, at the annual meeting of said corporation, by any corrupt or unlawful considerations, or by any persons who were not *bona fide* holders of stock, or proxies of stock, in said corporation, or of any persons who had not a right to vote at said annual meeting ; . . . that the said Minot and Stearns, being fully aware that a majority of the votes at the coming annual meeting of the Concord Railroad would elect a new board of directors who would wholly oppose their schemes and prevent their accomplishment, with the express design to forestall and render nugatory the opposition of a majority

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of the stockholders at said annual meeting, and the action of the board of directors that should there be chosen, and to secure to the said Minot and Stearns and their confederates the control and management of said Concord Railroad, and the payment of all its net current income over ten per cent. upon its capital stock to the Northern Railroad, and thereby deprive the said Concord Railroad of any reserved fund for extraordinary necessary expenditures, increase of furniture and permanent works, such as should be required by the natural increase of business, and deprive the State of its just right to the surplus earnings of the road, and also in furtherance of the scheme of consolidation aforesaid, on or about April 29, 1870, procured the formal execution of the instrument named in said bill, and the said Stearns approved the same as governor, and procured two of the railroad commissioners, meeting at Boston in the State of Massachusetts, in the absence of, and without notice to, the third commissioner, or any substitution of any person in his place as by law provided when a commissioner is disqualified, and it having been expressly agreed and understood that the said Stearns himself should be the agent contemplated by the said instrument, in whose hands should be placed the entire property of the Concord Railroad and its dependencies, and the management thereof, to the exclusion of the directors for the time being, as provided by the charter, for the term of five years; and the said Stearns and Minot and all of the officers of the Northern Railroad and Concord Railroad, by whom said contract was entered into or approved, well knowing the unlawful purposes for which said instrument was made; that the said instrument, if otherwise valid, was fraudulent and void by reason of the manner and motives in and with which it was entered into and approved; that it was not such an instrument as could be made by the corporation itself without the previous

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authority of the legislature, which had not been obtained ; that it was not in the power of the directors of the Concord Railroad for the time being to take from their successors the supervision, management, and control of the railroad, and from the corporation itself, its own property, for the period of five years as therein attempted ; that the defendants named as directors in said bill were legally and properly chosen as such, at said annual meeting, by a large majority of all the legal votes, and were afterwards, on the same day, duly organized as a board of directors ; that the said defendants had no purpose at any time of increasing the rates of fare and freight upon said Concord Railroad, but, on the contrary, intended to reduce the same ; that they did not, at any time, have any purpose or intention of taking any action in reference to the suits mentioned in said bill, other than such as should be legal and proper, and for the best interests of the corporation, nor was there, at any time, any agreement or understanding that any other disposition should be made of said suits ; that the said defendants had at no time any purpose or intention to declare and pay, or induce any other persons to declare and pay, any extra dividends to themselves or others, nor did they at any time enter into any agreement with other persons for any such object ; that they did not at any time have any purpose or intention of effecting in any way any increase of the capital stock of said corporation by any means whatever ; that they did not at any time have any purpose or intention of effecting or giving any countenance to the consolidation project mentioned in said bill, but, on the contrary, one motive which they had in endeavoring to effect a change in the board of directors was to defeat and prevent the accomplishment of any such object ; and they wholly repudiate and deny all unlawful combination, intention, or motive, or action, charged in said bill, and in-

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sist that said pretended contract is a fraud on their rights, illegal, null and void.

May 24, 1870, a temporary injunction was issued, restraining the newly elected directors of the Concord Railroad from taking possession of the road. At June law term, 1870, a motion to dissolve this injunction was argued at length. The term was adjourned to August, 1870, when an order was made placing the Concord Railroad in the hands of receivers during the pendency of this suit. At December term, 1870, the case was submitted upon the pleadings, and the evidence taken by both parties. The members of the court who sat in the cause differed in their findings of fact upon this evidence, and delivered opinions *seriatim*. It is assumed that the conclusions of fact arrived at by each judge will sufficiently appear in the respective opinions.

Perley, Tappan, E. A. Hibbard, Pike, Fowler, C. F. Choate, Minot, Mugridge, for plaintiff.

B. R. Curtis (of Massachusetts), *Harry Bingham, Marshall & Chase, Edmund Burke, Eastman, Page & Albin, C. R. Morrison, Rolfe*, for defendants.

SMITH, J.*—Upon the evidence, I find that the old board of directors, at the time of making the contract, believed that they were going to be voted out of office at the coming election by the friends of the new board; that they made the contract for the express purpose of preventing the incoming directors from assuming the management of the corporate affairs; and that, without this purpose, they would not have made the contract. I find also that these facts were known to the other contracting party, the Northern Railroad. Upon these findings I hold the contract void, for substantially

* FOSTER, J., and LADD, J., did not sit.

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the same legal reasons as those expressed by Judge Doe.

It has been suggested that there is such reason to apprehend perversion of the trust by the legally elected directors of the Concord Railroad as will justify the court in continuing the receivership and withholding from them the possession and control confided by the charter to the directors "for the time being." Upon all the evidence, I am not satisfied that there is cause for withholding from the new directors the management of any portion of the corporate affairs, except the suit against George Clough and the suits against other former conductors. By the injunction just issued in *Fisher v. Concord Railroad*, the new board are already prohibited from controlling those suits. I am in favor of dismissing this bill brought by the Northern Railroad; thereby discontinuing the general receivership, but leaving in force the order just made in *Fisher v. Concord Railroad*, by which a receiver was appointed to take control of the suits against former conductors.

It appears that two (SARGENT, J., and SMITH, J.) of the four justices who sit in this cause, are of opinion that the bill should be dismissed at this time, but that the two remaining justices (BELLOWS, Ch. J., and DOE, J.) think otherwise. The court being thus equally divided, can any final disposition be made of the cause at this time?

In the absence of any statute provision applicable to such a case, no judgment can be rendered except by a majority of the members of the court. When a court, consisting of several members, is equally divided on any order, "it seems to be a proposition too plain for argument that the court can do nothing." "If affirmative action is necessary for the further progress of the cause, the division operates as a stay of proceedings." See WARE, J., in *Goddard v. Coffin, Davis*, 381, 388;

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FIELD, J., in *Durant v. Essex Co.*, 7 *Wall.* 107, 110; *Tidd Pract.* 930; 3 *Chitty Gen. Pract.* Am. ed. of 1836, 10; *Ram on the Science of Legal Judgment*, Am. ed. 49. The difficulty can, of course, be removed by an agreement among the judges. There may be cases where, notwithstanding an equal division on the intrinsic merits, the judges may agree that it is expedient to render judgment and thus finish the litigation, rather than to allow a dead-lock to continue indefinitely; and there may be a standing agreement among the members of a court to render a certain judgment in all such cases situated in a certain position. See CHAPMAN, J., in *Durant v. Essex Co.*, 8 *Allen*, 103, 107-8. If there exists in the courts of other jurisdictions a uniform practice of rendering judgment for the one party or the other in cases situated like the present, the standing agreement among the members of those courts might have weight in inducing us to agree to make a similar final disposition of this case. We have examined numerous reported cases where the court were equally divided,* but we fail to find a uniform practice of rendering judgment for or against either party in cases analogous to the present. On the contrary, the weight of precedent seems to be against such

* Besides the cases referred to in the opinion, see also *Pickering v. Appleby*, 1 *Com.* 354; *Jeverson v. Moor*, 12 *Mod.* 262; *S. C.* (as *Iveson v. Moore*), 1 *Lord Raymond*, 486; 1 *Salk.* 15; *Rex v. Stone*, 1 *East*, 63; *Dean, &c. of Rochester v. Pierce*, 1 *Campb.* 466, 468; *Levy v. Green*, 4 *Jur. N. S.* 86; *Dansey v. Richardson*, 3 *El. & Bl.* 144, 722; *Chilton v. L. & C. Railway Co.*, cited in note 3, *El. & Bl.* 722; *Reed v. Davis*, 4 *Pick.* 216; *Guild v. Guild*, 15 *Pick.* 129; *Shannon v. Shannon*, 10 *Allen*, 249; *Jewell v. Jewell*, 1 *How. U. S.* 219, 234; *Penniman v. Perce*, 9 *Mich.* 509; *Michigan, &c., R. R. Co. v. Leahey*, 10 *Id.* 193; *Com. v. Beaumarchais*, 3 *Call*, 122; *Hatton v. Weems*, 12 *Gill & J.* 83; *Brown v. Aspden*, 14 *How. U. S.* 25; *Kemper v. Trustees of Lane Seminary*, 17 *Ohio*, 293, 329; *Kerr v. Whiteside*, 1 *Breese*, Appendix 6; *Ableman v. Booth*, and *U. S. v. Booth*, 11 *Wis.* 498; *Lanning v. London*, 4 *Wash. C. Ct.* 332.

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a course. The cases which have, for all practical purposes, been finally disposed of by a divided court, are mostly dissimilar to the present. Thus, where the judges of a court of error or appeals are equally divided upon the question of affirming or reversing the judgment rendered in a lower court, the judgment of the court below is affirmed. *Etting v. Bank of U. S.*, 11 *Wheat.* 59; *Durant v. Essex Co.*, 7 *Wall.* 107 (and Appendix, p. 753); *Bridge v. Johnson*, 5 *Wend.* 342, 371-5; *Baring v. Shippen*, 2 *Bin.* 154, 173; *Reg. v. Millis*, 10 *Clark & F.* 534, 907; *Baker v. Lee*, 8 *House of Lords Cases*, 495, 512; *Deighton v. Greenville*, 2 *Shower*, 48, note; *Hickman v. Cox*, 3 *C. B. (N. S.)* 523, 568; *Warburton v. Loveland*, 1 *Huds. & B.* (Irish Exch. Chamber) 623, 725; *Hammond v. Ridgely*, 5 *Harr. & J.* 245, 284; *Blanchard v. Hasler*, 6 *Monroe*, 193; *Tuck v. Barnard*, *Supr. Ct. of N. H.*, Rockingham, September term, 1805, where the court (WINGATE, J., and LIVERMORE, J.) being equally divided upon an appeal from the probate court, the decree of the judge of probate was affirmed. So, where there is a higher court to which the case can be carried, the judges of a lower court have sometimes rendered a *pro forma* judgment, in order to admit of an appeal or a writ of error. See *Thornby v. Fleetwood*, 1 *Strange*, 318, 379; *Deane v. Clayton*, 7 *Taunt.* 489, 507-8, 536; *Cockle v. L. & S. E. Railway Co.*, *Law Rep.* 5 *Com. Pleas*, 457, 472. Again: the position of a case may be such that a failure to decide the particular point upon which the court are divided does not prevent the rendition of final judgment. If, for example, there is a general rule entitling a party who has obtained a verdict to an entry of judgment unless cause is shown to the contrary, and it happens that the court are equally divided as to setting aside the verdict or arresting judgment, the party has his judgment under the general rule, "there being no rule made to stay

it." He does not require affirmative action on the part of the court. See *Chapman v. Lamphire*, 3 *Mod.* 155 ; *Walmsley v. Russell*, 6 *Id.* 200, 203 ; *Foot v. Tracy*, 1 *Johns.* 46, 54 ; *WARE, J.*, in *Goddard v. Coffin*, *Daveis*, 381 ; *FIELD, J.*, in *Durant v. Essex Co.*, 7 *Wall.* 107, 110.

None of these authorities are applicable to the present case. Here is no order or judgment of a lower court to be reversed or affirmed ; nor is there any higher court to which the cause can be carried on appeal or error, if a *pro forma* judgment should now be rendered. The position of this case is not dissimilar to the cases in the English courts of law, where there is a special verdict, or a case reserved for the opinion of the court *in banc*, or where a verdict has been taken, subject to the opinion of the court *in banc*. In such cases, if the court are equally divided, no judgment is rendered for or against either party. In *Buxton v. Mingay*, 2 *Wils.* 70, a verdict was found for the plaintiff, subject to the opinion of the common pleas upon a case made. The judges being equally divided, *WILLES, Ch. J.*, said, p. 73, "therefore, as the court is equally divided, there can be no rule, but let the *postea* remain in court." In *Boulton v. Bull*, 2 *H. Blacks.* 463, "a case was reserved for the opinion of the court." The court being equally divided, "no judgment was given." . . . See p. 500. In *Deane v. Clayton*, 7 *Taunt.* 489, a verdict was found for the plaintiff, subject to a point which *DALLAS, J.*, reserved. After argument upon a rule *nisi*, the court "directed that the case should be turned into a special verdict, and that it should be again spoken to." *BURROUGH, J.*, in delivering his opinion, said, p. 507-8 : "If I still find that the court is divided on the question, thinking it, as I do, a matter of great importance to the public, and to be a case that ought to be decided the one way or the other, I shall decline giving my judgment on this

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occasion, that the party may have the judgment of this court reconsidered in another." At the close of the opinions delivered, GIBBS, Ch. J., said, p. 536, "As the court is equally divided, regularly no judgment can be given. If, however, the plaintiff thinks fit to avail himself of the suggestion of my brother BURROUGH, judgment may be entered for the defendant, in order that the plaintiff, if he shall be so disposed, may carry the matter further; if he shall not be disposed so to do, no judgment at all is to be entered." Attorney-General v. Jefferys, *McClelland*, 270, was an "information of seizure." GRAHAM, B., at the trial, "left the question of intention to the jury;" the jury found for the crown, and a verdict was taken for all the goods seized at Paddington, subject to the opinion of the court above. The court of exchequer being equally divided, ALEXANDER, C. B., said, p. 308: "The effect of what has taken place is, that there will be no judgment upon this record." The following note is appended to the report (p. 308, note a)—"In this case, the court being equally divided, the effect of which was that there was no judgment, and things were to remain as they were, the lords of the treasury, on petition, ordered the property seized to be restored to the defendant." In other words, the goods seized were not restored until the plaintiffs virtually gave up the litigation.

These decisions are in conformity to the early English practice. It was assumed that, in case of equal division, no judgment could be rendered. The embarrassment arising from this cause was attempted to be guarded against by the statute of 14 Edw. III. (see *Co. Litt.* 72 a; *Com. Dig.* "Courts, D, 5"), but the remedy there provided became obsolete (see PRATT, Ch. J., in *Thornby v. Fleetwood*, 1 *Strange*, 368, 383), and James I. added a fifth judge to the king's bench and common pleas, to prevent the "impediment" to

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the "execution and expedition of justice" arising from an equal division of the court. Preface to 4 *Coke's Reports*, 17. See the opinion of "the two chief justices," in Sir Stephen Proctor's Case, 12 *Coke*, 118.

In the United States circuit court, if the court are equally divided upon a hearing in equity, it is said to be the common course to dismiss the bill, without costs to either party. See STORY, J., in *Veazie v. Williams*, 3 *Story*, 632. But it would seem that the decree of dismissal is entered "so that the parties aggrieved may, if they think proper, bring up the question" to the supreme court, "on appeal for review from the final decree." See NELSON, J., in *Silliman v. Hudson River Bridge Co.*, 1 *Black U. S.* 582, 585. In the supreme court of Ohio, upon an equal division, bills in chancery have been dismissed. *Waddle v. Bank of U. S.*, 2 *Ham.* 335; *Bank of U. S. v. Schultz*, *Id.* 471.

In the supreme court of Massachusetts, if a judge reserves questions of law for the consideration of the full court, and the judges are equally divided on a point which involves the plaintiff's right to recover, it is said that "judgment is commonly rendered for the defendant." CHAPMAN, J., in *Durant v. Essex Co.*, 8 *Allen*, 103, 107.

The result of our examination of the authorities is, that the practice in other courts has not been entirely uniform, but that the weight of precedent is opposed to the final disposition of causes in a situation analogous to the present. There is no rule of practice in this State providing for the final disposition of such causes, so long as the court remain equally divided. Perhaps such a rule may be established in some future case, where all the members of the court can take part in framing the rule. In the present case, one-third of the judges are disqualified to act. As the court are equally

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divided upon the question of dismissing the bill, and no agreement has yet been arrived at as to the final disposition of the cause, we are unable to see how any final decree can be made at this time, unless some way can be devised to make two a majority of four. The cause, therefore, remains pending; and the receivers, having been appointed to hold the property during the pendency of the suit, remain in possession.

[NOTE. The cause was soon after compromised by the parties.]

DOE, J.—The contract which the Northern Railroad seeks to enforce in this suit, is void because of the purpose for which it was made by the former directors of the Concord Railroad, the purpose being known to the Northern, and the contract being disowned by the Concord. The purpose was, to anticipate, and practically defeat, the election of the present directors of the Concord, at the annual meeting then near at hand, if the present board should be chosen. The purpose was, by substantially transferring the management of the Concord, for five years, to the Northern, to prevent the management from going into the hands of their own successors, if the present board should be chosen. This probably was not the only object of the contract; but it was the controlling object,—the object without which the contract would not have been made as it was made. Without this purpose, the contract would have been delayed, and proposed to the stockholders at the annual meeting, or have been made subject to their ratification. For although, by the form of the contract, the Northern guaranteed to the Concord, the preservation of its property, and the highest legal dividends, and although it might be presumed, under ordinary circumstances, that the stockholders of the Concord would gladly accept a guaranty so advantageous to

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them, still such a comprehensive contract as this, would generally, in New Hampshire, be submitted to the stockholders.

The former board may have feared that, if the present board should be elected, the interests of the corporation would suffer in their hands. The court, by a unanimous order, retaining a part of the property of the corporation in the hands of a receiver, have now decided that there were good grounds for such a fear. But such a well-grounded fear could not authorize the former board to make this contract. The danger could be averted by proceedings at law instituted by parties whose rights were imperiled; but it was not in the power of the former board, by this contract, to shield the corporation or any of its stockholders from the consequences of the action of the majority in the election of directors. The order now made may seem to vindicate the motives of the former board; but the law does not uphold every contract that is morally and financially sound. There are many classes of transactions which might sometimes be proper and expedient, but which, if tolerated, would so often be improper and inexpedient, that, for various reasons, it is best that they should be wholly suppressed. If contracts made by agents, officers, directors, administrators, guardians, and other trustees, for the purpose of preventing the exercise of the fiduciary power by their successors, were enforced, when judiciously made, they would so often be made under false pretences of prudence that business of a fiduciary character would be liable to great embarrassments.

In contemplation of law, a contract made by an agent or trustee to defeat the fiduciary succession, cannot be necessary for the protection of legal rights. If a breach of trust is apprehended in the succession, the law furnishes remedies which it regards as ample, such

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as those now in operation in this case,—a receivership and an injunction.

And the reason of the law is much deeper than these considerations of expediency and convenience. When an agent makes a contract because he believes the subject matter of it will be mismanaged if his agency is revoked and another agent appointed in his place, this object, known to the other contracting party, renders the contract void if the principal rejects it, for the reason that the agent is not authorized to make the contract for that purpose, and the other party, being aware of the purpose, is aware of the want of authority. It is no part of an agent's authority to protect the interests of his principal by forestalling and nullifying the action of the principal in transferring that authority to another person. The former board were agents elected for one year. They were not empowered to veto the transfer of their annual power to their successors, or to veto the election of their successors, or, by any method designed for the purpose, to practically destroy the corporate electoral power, or to suspend or postpone the exercise of it an hundred years or five years. The office conferred upon them by the electoral power, did not include an authority to resist and frustrate the power that gave them official life. It cannot be presumed that the creative faculty intended to create agents for its own overthrow, or that the legislature intended to expose the elective franchise of the stockholders to a constant risk of involuntary self-destruction.

The same principle would apply if a board of selectmen or overseers of the poor should make a contract for the purpose of throwing the subject matter of it beyond the reach of their successors, the purpose being known to the other party in the contract; or if an application were made to remove an administrator or guardian, and to appoint another in his place, and he,

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being notified of a hearing on the application, should there upon make a contract for a similar purpose known to the other party. Whether the result, in this case or in any case, would be different if the purpose were not known to the other party, it is not necessary now to inquire.

The contract, for this reason, being at least voidable when made, and being rescinded by the defendants, is absolutely void. It could not be made valid by the railroad commissioners, and the governor and council, under *Gen. Stat.* ch. 150, § 10, or by the legislature, *Gen. Stat.* ch. 145, § 2. A void contract is not a contract in a legal sense. There was no contract to be "sanctioned in writing by the railroad commissioners," "approved by the governor and council," or "authorized by the legislature." And there was no power in the State, capable of making, for these parties, a contract which they had not made for themselves.

The property of the Concord Railroad has been taken from the Northern Railroad and placed in the legal custody of receivers by order of the court, and it ought not to be returned to the Northern Railroad. Whether it should remain any longer in the hands of receivers, or pass immediately into the possession of the directors of the Concord Railroad, is a question raised and argued in the case of *Fisher v. Concord Railroad*.

SARGENT, J.—Upon the first point I agree with Judges SMITH and DOE, who have delivered opinions in the case, that the contract between the Concord Railroad and the Northern Railroad is void. I have never been able to see, since this bill was first considered, how, by any possibility, a contract like this could be considered valid to bind the successors of the board which made it, when it was so plainly made with the intent and for the purpose, on the part of the

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old board, of preventing the new board from taking possession of the road, and exercising those powers and performing those duties which, as directors of the road, it was incumbent upon them to exercise and perform,—the other contracting party having full knowledge of such purpose and intent.

Such a transaction is clearly fraudulent as against the new board of directors of the Concord Railroad. But the evidence in this case shows, we think conclusively, that had it not been for such purpose and intent on the part of the old board of the Concord Railroad, this contract would never have been made; of all which the contracting party had full knowledge. I concur fully, then, with those who have preceded me, in finding this contract void; that the Northern Railroad has no right or power under that contract to the control of the Concord Railroad.

Such an arrangement was not only fraudulent as against the new board of directors, but also as against the stockholders in the Concord road, because by it their acts, in electing a new board of directors and putting them in charge of their road, were to be nullified and avoided, and prevented from having any force or effect whatever. Such was the design and purpose of the old board in making this contract; and the evidence shows that the officers of the Northern road were fully cognizant of such purpose and design. If then it is an elementary principle in law, as it has long been supposed to be, that fraud vitiates all contracts as against those parties who are attempted and intended to be defrauded thereby, then it follows that neither the new board of directors nor the stockholders in the Concord Railroad are in any way bound by the contract under consideration. *Twine's Case*, 3 *Coke*, 80; S. C., 1 *Smith L. Cas.* 29-60, and English and American cases cited; *Robinson v. Holt*, 39 *N. H.* 557, 562, and New Hampshire cases cited; *Leach v. Tilton*, 40 *N. H.*

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473; Coolidge v. Melvin, 42 *Id.* 510; Pomeroy v. Bailey, 43 *Id.* 118; True v. Congdon, 44 *Id.* 48; Page v. Jewett, 46 *Id.* 441.

Nor have any rights been waived or lost, by acquiescence or ratification, on the part of these defendants or the stockholders in the Concord Railroad, but they have objected and protested against this contract upon all proper occasions and in all proper ways.

During the pendency of this litigation the Concord road has been placed in the hands of receivers.

We are all of opinion, that when a suit is pending involving the right to the possession of a railroad, this court may, even in the absence of any application to that effect on behalf of the stockholders or of the State, place the railroad in the hands of a receiver, if that course is necessary to prevent serious injury to the public or to *bona fide* stockholders. But this is an extraordinary remedy, to be applied only as a last resort, and not except where urgent necessity demands. A court of equity is not a tribunal well adapted to the management of a railroad, nor is a receivership an arrangement which can well be continued for any great length of time. The officers chosen by the stockholders are ordinarily the proper managers of the corporation, and nothing but imminent peril to the State or to the stockholders can justify any interference with their control.

And when it is settled and decided by a majority of the court that the contract which we are asked in this case to construe as valid and binding is void, the question then arises whether the road shall remain in the hands of the receivers, or whether it shall go into the hands of those who are set forth in this bill as directors, who are treated and considered and styled as such, and who were declared to be elected to that position at the annual meeting of the Concord Railroad. Upon that point my conclusion is that the contract being held by

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a majority of the court to be void, the road should thereupon pass into the hands of the new board if they have been legally elected, and are not shown to be otherwise disqualified to execute that trust.

As to the legality of their election, I cannot conceive there is really any question. That there were some irregularities in voting upon stock, that there may have been some stock purchased with money improperly obtained, may not be worth while here to consider. Admitting it to be so for the sake of the argument, however it may be in fact; taking all that out, and making all deductions that any one can properly ask, I do not understand that it is really questioned here, or can be questioned, that the new board were elected fairly and legally, by a large majority of the stock which was properly and legally represented at that meeting. Upon this point we all agree.

They being legally elected directors, the next question is, whether there is anything developed in the present investigation which should prevent their receiving the property which they were elected to receive, and over which they were elected to take charge and have control.

It is objected that some of the stock which was used to elect the new board was purchased with funds borrowed from corporations in which the borrowers were officers, and that the loans were thus in fact obtained by a breach of trust.

To this it may be answered, in the absence of complaint on the part of the *cestui que trusts* in those corporations, the stock purchased with funds so borrowed from those corporations is the stock of the parties who voted on it.

The security given to the banks for the money loaned was in every case ample and satisfactory. There can be no question but the same amount of money could have been obtained in Boston or New

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York, or almost anywhere else where money was to be had at all, upon the same security. I do not understand by the evidence here, that there was any intention on the part of anybody either to defraud any savings bank or other bank, or to use the funds of such banks without first giving to the bank satisfactory and sufficient security. That was all that the banks need to trouble themselves about—all they ever have troubled themselves about. It does not appear here but that in every bank from which the money was obtained, the stockholders and depositors are entirely satisfied with the security; and it strikes me that that should be the end of our inquiry about the interests of the savings banks. Nobody having any interest has complained that the money has been improperly loaned by those banks to this new board, so far as I have learned; and there is nobody who complains that the security for all the money loaned was not ample and sufficient.

In regard to the matter of the Clough suit, we have made an order which, as I understand it, makes ample provision against any uncertainty there may have been upon the evidence before us as to the intention of the new board, or whether there was a possibility that they might, upon the evidence, have made an improper application of their power, or an improper settlement of the Clough suit and the other conductor suits. However we may regard the evidence upon that point, it is at least proper that everything should be done, which can be required, to make the matter entirely safe, and guard against any possibility of wrong to any stockholder of the Concord road. With that view the order was made in reference to the Clough suit, so that nothing is now to be feared in regard to that, or any of the other conductor suits, by any stockholder in the road.

But it is asked with great assurance, "If the new board cannot be trusted with the trifling amount of the

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made, and that the case must remain in its present condition.

Entertaining these views, it becomes unnecessary to consider the important question, so ably discussed by eminent counsel, of the power of the directors to make such a contract as the one in question, provided they acted in good faith and without any improper motives; and also the further question, whether, if such a contract might properly be made in any case, it has in this case received the proper sanction and approval of the proper State authorities to make it binding under the statutes. Upon these questions I express no opinion.

BELLOWS, Ch. J.—On this application to dissolve the injunction restraining the use of force by defendants to obtain possession of the Concord Railroad and its incidents, the question is whether it is made to appear to the court so clearly that the plaintiff has no title, as to justify the dissolution of the injunction before its final hearing.

The principle that ought to govern the court, I think, is this: that until the court is prepared to restrain the plaintiff from the use of force to resist the attempt of the defendants to take possession, the injunction against the use of force by defendants ought to stand; and before such an injunction should issue against the plaintiff, the title of the defendants should appear so clearly as to warrant a final decree against the plaintiff. Or, in other words, the dissolution of this injunction should be, and would be, equivalent, in effect, to a final decree against the plaintiff.

The first question is, whether these corporations had the power to make such a contract as was here made, and if so, whether that power has been legally executed. And, first, as to the power. A question much discussed at the bar, and upon which great stress was placed, is, whether the two corporations had power to

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make such a contract without the direct assent of the legislature, it being contended by the plaintiff that the case came within the provisions of *Gen. Stat.* ch. 150, § 10; while defendants contended that it must be governed by ch. 145, § 2 of those statutes. It may be conceded in general terms, that a contract for the use of one railroad by another,—that is, for the entire use and working of it,—cannot be made without the assent of the legislature, or something equivalent to it; and this, we think, is clearly the policy of our legislation.

But it by no means follows that this assent is to be specially given in every case, for we apprehend that the legislature can, by general law, authorize railroad corporations to make contracts involving some use of each others' roads without any special assent of the legislature, or with the sanction of the governor and council and railroad commissioners, as a substitute for the assent of the legislature.

And the real question in this branch of the case is, whether the legislature, by such general law, has authorized such a contract as was made here.

Section 10, chapter 150 of the *Gen. Stat.* provides that "no contract between two or more railroad corporations for the use of their roads shall be legal or binding for a longer time than five years, nor unless sanction in writing by the railroad commissioners, and approved by the governor and council."

This prohibition of this class of contracts without the sanctions provided for, carries with it by implication a right to make such contracts with those sanctions. *Concord Railroad v. Greeley*, 17 *H. N.* 54.

It will be assumed, then, that the legislature has authorized this class of contracts, if sanctioned in the manner required, and in such case the contract is as valid and binding as if specially authorized by the legislature.

The question then is, What class of contracts did

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the legislature intend to embrace and provide for in this section ?

Of course, in determining this question we are to take into consideration other legislation *in pari materia*, and such acts are to be taken together as one law. *Sloan v. Bryant*, 28 *N. H.* 67; *Hayes v. Hanson*, 12 *N. H.* 290.

We are also, in case of doubt, to take into consideration the previous legislation upon the subject, and the policy established by it, so far as it may bear upon this question.

In *Gen. Stat.* ch. 145, § 2, we find provisions which in *terms* are in direct conflict with section 10 of chapter 150. Section 2 provides that "no sale, lease, mortgage, or contract, for the use of any railroad, shall be valid, unless it be in writing, filed in the office of the secretary of state, and authorized by the legislature." In both of the sections we find a prohibition of contracts for the use of a railroad, unless sanctioned in the one case by the legislature, and in the other by the governor and council and railroad commissioners.

By well settled rules of construction, the court should endeavor to harmonize these provisions so as to give effect to both, and if that cannot be done, to endeavor to ascertain the intention of the legislature, and to give effect to it.

Upon this subject two totally different views are presented by counsel: one is, that the terms "contract for the use of their roads," in section 10, are confined to the regulation of the ordinary connections between railroads in the transportation of the passengers and freight of one over the road of another, and do not extend to the entire use and working of one road by another for any space of time; that this is indicated by the title of the chapter, "Railroad Connections;"

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and that with this construction, these terms in both sections would take effect.

On the other hand there is great force in the suggestion that the terms of this section 10, as originally reported by the revising committee, very clearly related to this sort of connection, suggested by the defendants' counsel, but that the legislature amended the section by striking out those restrictive terms and restoring the terms of the act of 1850, which were clearly broad enough to embrace all contracts for the use of a railroad, whether for the entire or partial use.

As originally reported, the contracts requiring the sanction of that section were "*for the transportation of freight and passengers, or in relation to conducting the business of their road.*" This was struck out, and the words "between two or more railroad corporations for the use of their roads, shall be legal" inserted.

If these terms, limiting the word contract so as to mean what is now contended for by defendant's counsel, were struck out, and terms broad enough to embrace all contracts for the use of a railroad inserted and passed, it would be strong evidence that the term contract was not used in this restricted sense. In *Rich v. Flanders*, 39 N. H. 304, it was held that the intention of the legislature, that a law should apply to pending suits, was very clearly expressed by repealing a provision in a former law that it should not so apply. For a similar but stronger reason, the intention of the legislature that the term contract should not be so restricted, may be gathered from this amendment.

It is to be observed, also, that this construction, contended for by the defendants, is inconsistent with the previous sections of chapter 150. Those sections clearly relate to railroad connections in the restricted sense used by defendants' counsel. They provide that

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one railroad shall draw over its road the cars, passengers, and freight that may be brought to it by another railroad, having a right to enter upon and use it, or to enter upon and use a connecting road ; but shall not be required to allow its road to be used by any but its own motive power ; and then it provides, that if the parties cannot agree upon the terms of such service, the supreme court, or two justices thereof, may appoint referees to determine the same, and they shall fix the rates and terms for the future, and their award shall be valid and binding, until altered by the parties or the legislature, or a new decision by referees.

In these provisions there is nothing that indicates any necessity of action by the governor and council or railroad commissioners. On the contrary, the power to adjust the terms of this connection by the simple agreement of parties is very clearly contemplated ; and it is even provided that the award of the referees may be altered in the same way,—that is, by the agreement of parties.

It is believed, also, that the practical construction given to the law of 1855, of which the sections of chapter 150 preceding section 10 are but a revision without substantial change, has been in accordance with these views, and that the sanction of the governor and council and railroad commissioners has not been obtained to contracts adjusting the terms of such connections. Neither is there anything in the nature of the service required, namely, the drawing over its line of the cars and passengers and freight of another railroad, that would make it reasonable to suppose that such a sanction to a contract respecting it would be deemed necessary, especially when we consider that the legislature has entrusted to the various boards of directors the duty of fixing the tolls for their respective roads.

A construction, then, of section 10, such as is urged by the defendants' counsel, would not only be incon-

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sistent with its terms, which indicate no such restricted meaning, but totally inconsistent with the previous sections of the same chapter, with the obvious intention of the legislature in making the amendment alluded to, and with the practical construction given to the act from which it was taken.

The defendants' construction would indeed make section 10 operate as a repeal of all the previous sections of the same chapter, except the two first,—a proposition which is wholly inadmissible. As has been before remarked, this section 10 was taken from the law of July 13, 1850, ch. 953, § 8, which provided that "no contract between two or more railroad corporations, for the use of their roads, shall be legal or binding on either party, unless such contract shall be sanctioned, in writing, by the railroad commissioners, and approved by the governor and council, and in no case shall such contract be for a longer term than five years; and no such use of another road shall be allowed, unless by contract, in writing, executed by both parties, and a copy filed with the secretary of state."

The chapter in which this is found is an amendment of the law in relation to railroad corporations, and has nothing to do with the connections of railroads in the restricted sense alluded to. The terms are certainly broad enough to include any contract for the use of one railroad by another, and the requirements are certainly more elaborate than would be looked for in an agreement to fix the terms of such a service as drawing the cars of another road over its line.

On the other hand, the occasions were numerous where the interests of the public would be promoted by a contract which would enable a strong road to equip and operate a weak one for a short time, receiving a certain compensation for the service on paying to the other, out of the avails, a sum agreed upon.

Such contracts have often been made, as with the

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Cochecho, Great Falls & Conway, Portsmouth & Concord, Manchester & North Weare, Manchester & Lawrence, Wilton, Concord & Claremont, Contoocook Valley, Sullivan, Ashuelot, and White Mountains railroads.

In many of these instances it was for the interest of the public and the stockholders of both roads that such a contract should be made; and it would not be unreasonable to suppose that the legislature, when it used terms clearly broad enough, for that purpose, intended to give such railroads power to enter into such contracts for a short period not exceeding five years, provided they were sanctioned by the railroad commissioners and the governor and council.

This law of 1850 was substantially re-enacted in this section 10, chapter 150, and should have the same construction, especially as the amendment before stated evinced the intention to adhere to the provisions of this law of 1850; and the fact that it is included in the chapter relating to railroad connections, cannot affect its construction, under the circumstances disclosed. When that section was placed there by the committee of revision, it was so changed as to make that the appropriate place; and when amended so as to alter its character entirely, it was still allowed to retain its place in that chapter.

As bearing upon the construction to be given to the law of 1850, and section 10, chapter 150, of the General Statutes, it should be borne in mind that neither in the law of 1851 or 1855, relating to the connections of railroads, was there any provision requiring the sanction of the governor and council and the railroad commissioners to the agreements regulating those connections. Those acts clearly relate to the drawing by one railroad over its line the cars, &c., of another, and, in fact, provide for it; and the mode of adjusting the terms for that service was, by agreement of the parties, by

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referees, or by the legislature. As, therefore, under these acts the terms of these railroad connections could be adjusted by agreement of the parties simply, without any sanction or approval by the governor and council or railroad commissioners, and as the law of 1850 was not repealed by them, this affords strong grounds for the inference that the law of 1850 was not understood to cover the same ground ; and as chapter 150 of the General Statutes is substantially a revision of the law of 1850, with the addition of section 10, the argument is very strong that section 10 was not understood to relate to the ordinary railroad connections.

As bearing upon the construction to be given to section 8 of the law of 1850, it will be seen by the House Journal of that year, page 465, that, while the bill was pending, Mr. Quincy moved to strike out the entire section, and insert instead, that "No railroad shall take a lease or hire the use of any other railroad, except specially authorized thereto by the legislature, and all such contracts made without such assent shall be null and void." Upon this amendment the yeas and nays were called, and it was rejected by a vote of 188 to 40, showing conclusively the intention of the house to give the right to contract for the use of a railroad for the term of five years without the special assent of the legislature.

It is certain that from 1851 to 1867 these connections might be adjusted by the agreement of the parties, without any other sanction whatever, and we see no evidence of any intention to change the law in this respect. The committee certainly reported such a change, but it was explicitly rejected by the legislature, and the law restored to the footing upon which it had stood for many years.

Section 2 of chapter 145 of the General Statutes is undoubtedly broad enough in its terms to embrace all cases of contracts for the use of a railroad, and so far

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as those terms are concerned might as well include the ordinary railroad connections as the same terms in section 10, chapter 150. This is not, however, contended for by either side.

Upon a fair construction of these two sections, standing by themselves, it would seem that the same kind of contract for the use of a railroad was embraced in both ; but as different sanctions are required in the two sections, we must qualify the one or the other according as we find the legislative intention. The two sections are to be construed together as if but one law ; and for the reasons already assigned, we think the legislature has unmistakably manifested its intention that section 10, chapter 150, should include contracts for the use of a railroad in its broad sense, and not limited to ordinary railroad connections, and, therefore, it must qualify the provisions of section 2, chapter 145, so that they shall apply to contracts for the use of a railroad only when for a term of more than five years.

As bearing upon the question of legislative policy and intention, it may be proper to consider the act of June 26, 1867, chapter 8, "to prevent railroad monopolies." That act expressly forbids the consolidation of rival or competing lines of railroad, or the running one of such lines by the other, under a business contract, lease, or other arrangement, without being first authorized so to do by the legislature, and approved by the governor and council. Section 3 provides that the act shall apply solely to rival lines, and not to contracts or leases for the running and operation of any road constructed as an extension or continuation of a separate and independent line, or as parts and parcels of the same, or to any side branches, tributary, or secondary to such line, all which are specially exempted from the provisions of the act.

It is clear, from these provisions, that it is in accordance with the policy of our legislature that one

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railroad should be permitted to operate another when not a rival line. It will be seen, also, that the policy of our legislation has given a liberal construction to the powers of railroad corporations.

By the Revised Statutes, chapter 142, section 10, any railroad corporation might contract with any other railroad corporation for the transportation of freight and passengers, and the conducting of all business connected therewith on their road. The law of July 5, 1851, and the General Statutes, chapter 150, providing for adjusting the terms of connection, imply the same thing.

This clearly recognizes the right to exercise the business of common carriers over lines of road beyond their own; and this is now the established doctrine in this State, that a railroad company may carry on this business not only beyond its own line, but out of the State. *Nashua Lock Co. v. Nashua & Worcester R. R.*, 48 *N. H.* 339-363; *Barter v. Wheeler*, 49 *Id.* 9-29; *Crafts v. B. & A. Express Co.*, Coös, July term, 1869. This liberal interpretation of their powers and responsibilities enables them to form such communications with other railroads as to make them answerable for the negligence and misconduct of such other railroads, by which injury is done to passengers or freight transported on joint account. If, then, two or more connecting railroads can enter into an agreement by which they may become jointly interested as common carriers of through passengers and freight over their connected lines, so as to be jointly liable for losses or injuries caused by the negligence or misconduct of either of them, it would seem to follow as a necessary incident that they might by agreement make all needful rules and regulations for the management of that business, extending even to the giving to one corporation the working of the entire line; and this would furnish another occasion for the exercise of the power to contract for the use of another railroad.

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In *Shawmut Bank v. Plattsburgh & Montreal R. R.*, 31 *Vt.* 491, it being assumed that the act under which the defendant corporation was organized empowered it to contract to transport and deliver persons and freight beyond the terminus of its road, as it in fact did, it was held that this power carried with it the necessary and proper incidental means of exercising and enjoying it, and that the means to be used are entrusted to the direction and management of the directors; that their acts were the acts of the corporation, and that they might bind it by the purchase of a steamboat to facilitate the business beyond their own line. Much the same doctrine is recognized in *S. W. R. Co. v. Redmond*, 10 *C. B. N. S.* 675.

This connection between railroads, by which they form one continuous line of common carriers for through business, and all being responsible for injuries and losses, has grown out of the demands of commerce; and the arrangements between them, though informal and without special legislative or other sanction, have been held good and valid to bind all the corporations as carriers. It is very obvious that this capacity must add very largely to the occasion for one railroad to contract with another for the use of its road, and the policy of allowing such connections seems to have been inaugurated as early as the Revised Statutes.

Taking into view, then, the history of our legislation on this subject, there is nothing in the nature of the case to render it unreasonable to suppose that the legislature intended to authorize a contract for the use of a railroad for a short period, when sanctioned by the governor and council and railroad commissioners. The most obvious objection to such a contract here, lies in the fact that the Concord Railroad is perfectly able to operate its own road. Had it been otherwise, and the Concord road had been weak and needed aid, the arrangement would have seemed well enough; and yet,

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as to the question of power, the condition of the roads is immaterial. The real inquiry is, whether, by a fair construction of the law, it can be seen that the legislature intended to give one railroad the power to contract with another for the use of its road for a short period without special authority of the legislature, but with the sanction of the governor and council and railroad commissioners to whom the power is delegated.

The power of the legislature to authorize the contract between two or more railroads, by which one may operate all, is not questioned.

It is very obvious that in many cases such an arrangement would be for the interest of the public, and also of the shareholders of both or all the corporations, because most economical and safe ; it being apparent that the frequent shifting of motive power and cars at the ends of short roads must be attended with great delay and expense, if not increase of risk ; and accordingly, to avoid this and save the necessity of re-shipping the through freight, the practice has become general of running the cars containing such freight over the whole line ; and in respect to that as well as through passengers, the different companies so connected are jointly interested, and responsible as common carriers.

When the through business is large, as it is understood to be over the Northern and Concord roads, it is obvious that their joint interest in the transportation of passengers and merchandise is a very important part of their whole traffic ; and as this may be regulated between the companies by agreement of the parties alone, it would seem not at all unreasonable that the legislature should give them the power to enter into an agreement by which one company should furnish the whole motive power, and operate both on all the roads for a short time, with the sanction of the governor and council and railroad commissioners.

In *Barter v. Wheeler* before referred to, it was held,

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that where several railroads make a business arrangement by which a continuous line is formed, and each sells tickets over the whole line, and contracts to carry goods through the entire route, and receives the price for it in one entire sum, which is to be divided in stipulated proportions among the several lines, the several companies composing this line may be regarded as jointly undertaking for the service, and are responsible for loss or injury upon any part of the line; and a similar doctrine was held in *Nashua Lock Co. v. Nashua and Worcester R. R.* In neither case was the assent of the legislature, or the governor and council or railroad commissioners, to such arrangement deemed to be necessary. The power to make such arrangement, and so to form a continuous line, is a necessary incident of the power to exercise the business of common carriers beyond the company's own line, and comes within the principle of *Shawmut Bank v. Plattsburg & Montreal Railroad*, 31 *Vt.* 491, and *S. W. Railway Co. v. Redmond*, 10 *C. B. N. S.* 675; see, also, *Hart v. Renn. & Sar. R. R.*, 8 *N. Y.* 37, where three different companies were operated together.

As, then, the different companies may have, by agreement between themselves, a joint interest in the through traffic over their roads, it would not seem to be unreasonable that the legislature should allow them to extend such joint interest to the local traffic with which the other is closely connected for short periods, provided it be sanctioned by the governor and council and railroad commissioners.

It is urged, also, that section 10 is the later expression of the legislative will, and on that ground must control section 2 of chapter 145.

If it is to be regarded as a later act, such would ordinarily be the effect; and from the authorities cited by the plaintiff's counsel from Indiana, it would seem that this section 10 was to be regarded as a later ex-

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pression of the legislative will than section 2 in chapter 145.

In *Ham v. State*, 7 *Blackf.* 314, it was held that a provision of their Revised Statutes was to be regarded as a later expression of the legislative will than a provision in a previous chapter, although both were passed at the same session of the general assembly. By the preceding chapter, the county treasurer was to hold his office three years from the first Monday of March next succeeding his election. In the subsequent chapter, it was three years from his election; and it was held that the latter must prevail.

Without, however, determining this question, we think that the intention of the legislature was, to authorize contracts between railroads for the use of their roads, according to the ordinary meaning of the terms, for five years, when sanctioned by the governor and council and railroad commissioners.

In this case the contracting parties are the Concord Railroad and the Northern Railroad. By the agreement, both roads with their branches and incidents are placed under the management of one agent, to be appointed and removed at any time by the Northern road, but acting for, and as the agent of, both and each of the parties, and who is to have the care, management, and operation of both roads for five years, reserving to the parties, by concurrent votes of their respective boards of directors, each board acting by itself, the same control over said management as is usual with boards of directors in ordinary cases, all the income of both roads to come into and belong to the joint management, and the agent to take charge of the same, subject to the control of the boards of directors by concurrent votes; and to avoid questions and controversies as to the division of the net receipts and income, there is to be paid from them to the Concord road, half yearly, the sum of seventy-five thousand dollars, and

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the remainder to be paid to the Northern road, which, in case of any deficiency, is to make it up to the Concord road.

The tolls now established by the Concord road are to remain, unless changed by mutual consent or by law; and in case any change is made or permitted by the Concord road without the consent of the Northern road, the amount of the deductions of income caused by such change is to be allowed towards the payments to be made the Concord road as aforesaid.

The substance of the agreement is, that the two corporations place their roads under the management of one agent appointed by the Northern road, but who is subject to the control of the two boards of directors acting separately and by concurrent votes. It is not strictly a lease, although the possession is to be in an agent, who may be appointed and removed by the Northern road, and yet he is expressly the agent of each road, and could be made responsible as such to the Concord road.

If it be a contract for the use of the Concord road, as the defendants' counsel claim it to be, or a lease, then upon the views already expressed I think the corporation had power to make it, if sanctioned by the railroad commissioners and the governor and council; and by express provisions in the charters, the directors are empowered to exercise all the powers granted to the corporations for constructing the railroad, and for transporting persons, goods, and merchandise thereon, and all other powers and authority not before granted, as may be necessary and proper to carry into effect the object of the grants.

What could be done by the corporations, could ordinarily be done, then, by the directors of those corporations; and as the law gives the corporations power to contract for the use of a railroad with the sanctions required, and as, when so done, the State must be

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deemed to have assented to it, the only question as to the power is, whether there is anything in this contract which renders it invalid as to the shareholders, and if so, whether such objection can be urged in this form.

In considering this question it is to be observed, that railroads in this State are expressly declared to be public corporations, and their roads, like other highways, are public, and at all times subject to the control of the legislature. See *Gen. Stat.* ch. 146, §§ 1, 2. In the charters both of the Concord and Northern roads, the legislature reserved the right to alter, amend, or modify the acts or any of their provisions; and from the beginning this power has been freely exercised in the enactment of laws for the regulation of those corporations.

From an examination of the authorities, I am satisfied that the shareholders would not be bound by a change in the charter which is fundamental, as by superadding a new and distinct business, or probably by authorizing the construction of an extension of its railroad. But I think it is otherwise where the act is merely auxiliary to the enterprise embraced in the original charter, and designed to facilitate its execution; and especially is it so where the right to alter, amend, or repeal the charter is expressly reserved, as it is here.

In *Boston, Concord & Montreal Railroad v. State*, 32 *N. H.* 215, it was held that it was no violation of vested rights to subject an existing corporation to a fine for loss of life caused by its negligence; and *BELL, J.*, says that the privileges of a corporation could not be construed to limit the general powers of legislation, where such legislation merely regulates the existing rights and duties of corporations, or provides new modes of enforcing acknowledged obligations.

The boundary between what will and what will not bind a shareholder may not be very well defined,

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although the cases are very numerous on that subject. I am inclined to think, however, that an act authorizing an existing corporation to enter into a contract with a connecting road, over which it might, and did, lawfully exercise the business of a common carrier, by which it might work such connecting road, or become jointly interested in the working of it, would be regarded as merely auxiliary to the business then lawfully conducted, and would bind the shareholders. The cases of *Shawmut Bank v. Plattsburgh & Montreal Railroad*, 31 *Vt.* 491, and *S. W. R. Co. v. Redmond*, 10 *C. B. N. S.* 675, are certainly very strong authorities in that direction—holding, as they do, that such power is incidental to the right to carry on the business of a carrier beyond its own line.

In the latter case, the plaintiff, a railroad corporation, and having a branch of its road terminating at Milford Haven, entered into a contract with defendant by which he engaged to run a steamboat between that port and ports in Ireland, in connection with plaintiff's railway, for the transportation of goods and passengers; it was held that such a contract was not *ultra vires*, but designed to facilitate the working of the railway, and that a suit might therefore be maintained against the defendant for breach of his contract, *ERLE*, Ch. J., holding that it was in the contemplation of the legislature that this railway terminating at Milford Haven should forward traffic to and from Ireland.

These views are designed to go no further than this,—that a contract entered into by the directors of two railroads, in good faith, to facilitate the conducting of business which they are lawfully doing, and in which they have a joint interest, the contract being sanctioned by the governor and council and the railroad commissioners, is not necessarily invalid because it embraces the use of one road for a period not exceeding five years.

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It may be invalid for other reasons,—as that it was entered into in bad faith, and not to promote the interests of the corporations; that it was designed to effect a fundamental change in the business of the corporation; or was subversive of its very object, as by putting an end to its existence, and the like.

On this point the case of *Vandall v. South Francisco Dock Co.* is reported in *Am. L. Reg.* 506, August, 1871. In that, the Dock Company was formed to “buy, *improve*, lease, sell, and otherwise dispose of, real estate,” and it entered into a contract with a railroad company, which was about building a railroad in the vicinity of lands purchased by defendants, for some increase in the width of the road, and a greater number of trips, for which defendants agreed to pay twenty thousand dollars. It was held that they might lawfully make such a contract to give increased facilities to those lands.

The question then arises whether this power has been properly executed,—and first, as to the approval by the governor and council.

It is urged that the approval of the governor and council was invalid and of no effect, for the reason that the governor, being a stockholder in the Northern road, was interested, and could not act.

It was very clear that a man shall not be judge in his own case, although there are cases where it is held that a judge who is interested theoretically, may, *ex necessitate*, sit in the cause; as, when jurisdiction is given to his court alone, and the city, or town, or county in which he lives would be entitled to the penalty which is the subject of the action or indictment. *Commonwealth v. Worcester*, 3 *Pick.* 462; *Hill v. Wells*, 6 *Id.* 104.

In the case of *Moses v. Julian*, 45 *N. H.* 52, the court does not assent to such a proposition, holding that the power resulting from necessity can extend no

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further than the case requires,—such as to order a continuance, transfer the cause to another tribunal, and the like,—but holds that it can never be necessary for a judge, who is disqualified to decide, to assume to determine a case which the law presumes he may probably decide wrong.

In that case, by declining to sit, it was held that an appeal might be taken, and the case carried to the supreme court. A case where no other court could have jurisdiction was not considered.

However this may be, I am of the opinion that the act of approval in the case before us was not judicial in its nature, but was rather of the same nature as the approval of bills passed by the two houses, which is governed by views of public policy; and such bills have always been approved by the governor, although he may have had a personal interest in them; and so in England, the royal assent is given to bills providing for the dignity and honor of the crown. See *Cushing's Pr. of Leg. Assem.* § 2365.

The approval of laws, and of these contracts, is required in substantially the same terms, and for aught I can see are acts of the same nature involving questions of public policy.

Had the two branches of the general court ratified and assented to this contract, the governor would have been called upon for his approval,—and I apprehend its validity could not have been questioned on account of his interest; and yet his act would have been of the same nature precisely as the direct approval of the contract.

The sanction of the railroad commissioners and the approval of the governor and council were to take the place of the assent of the legislature; and there is no difference in the nature of the acts; neither of them was judicial.

So it will be observed that the act could be done

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only by the governor. No provision is made for a substitute, thus presenting a strong case of necessity.

In this case there was no determination of the rights of parties, either of law or fact; no decision of any questions peculiar to judicial tribunals; but the question before the governor and council was, substantially, whether it was consistent with sound public policy that the assent of the State should be given to this contract—precisely the same question that was before the legislature when its assent was asked for.

This question of policy undoubtedly involved an exercise of discretion and judgment, but it was in its nature the same that is involved in the approval of bills, or in their passage, and is in no sense judicial. Article 35 of the bill of rights recognizes the importance of an impartial interpretation of the laws and administration of justice, and declares that it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit; but no such provision exists as to officers not judicial.

There is nothing then in the constitution that prohibits the action of the governor in a case like this, neither is there any such prohibition in the statutes.

In respect to some ministerial officers,—as sheriffs and their deputies for instance,—they are disqualified in some cases, by statute, by reason of interest, so that a sheriff cannot serve process where he is himself a party, nor can he return talesmen in a cause where he is interested, or related to either party. *Barker v. Remick*, 43 N. H. 237, but it does not appear that at common law he could not serve his own writ.

In other cases, upon principles of the common law, a person could not act, as in the case of a juror or witness. The functions of a juror were, however, judicial in their nature, and yet, notwithstanding his minute interest as an inhabitant of the State interested in a public prosecution, or of the county entitled to the fine

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sought to be imposed, the juror might sit; otherwise there would be a failure of justice. And so it is in respect to judges themselves in criminal causes where a fine might be imposed for the benefit of the county in which they reside.

In respect to the assent of the governor to bills passed by the two houses, it is required by the constitution, unless they are passed over his veto by a two-thirds vote of each branch, or the governor shall fail to return them in five days after they are presented to him; and there is no provision, either in the constitution or laws, for any substitute in case the governor is interested; and, therefore, *ex necessitate*, he may act; and as the bill has been sanctioned by both branches, it might well be deemed safe to hold it to be a law, notwithstanding the interest of the governor.

The same argument *ex necessitate* applies here. The act of the governor is substantially the same as in the other case, and the assent of the council has been given.

It is obvious that there is a broad line of distinction between acts which are judicial and those which are purely ministerial, in respect to the effect of interest as a disqualification; and, accordingly, on that ground, it has been held that the extent of an execution upon land is valid, although the oath to the appraisers was administered by the creditor. *Atherton v. Jones*, 1 *N. H.* 363. This was put upon the ground, by WOODBURY, J., that the act was ministerial. It has also been holden, I think, in this State, that the grantee in a deed may take the acknowledgment of the grantor.

So it has been held that an acknowledgment of a deed, taken by a justice of the peace of Strafford county, but in the State of Maine, was valid, being a ministerial act. *Odiorne v. Mason*, 9 *N. H.* 24.

I do not suppose, however, that upon the principles of the common law an officer, not judicial, may in all

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cases act where he is interested. On the contrary, when his action requires the exercise of judgment and discretion, and the act can be done by another, I think, as a general rule, he cannot act; but if the law provides for the doing of an act by a particular officer, and no provision is made in case he is interested for its being done by another, and there is no prohibition in such case, as there is in respect to a man being judge in his own case, then, I think, he may act.

It has been so held, even where the act was judicial, but the interest so minute that the legislature might disregard it, as in the cases cited from Massachusetts. Much more would it be so where the acts to be performed are not judicial, as in this case.

The case of *Phillips v. Eyre*, *Law Rep.* 4 Q. B. 225, is very much in point. It was an action for assault, false imprisonment, and taking and carrying away goods, alleged to be done in the island of Jamaica. The defendant pleaded an act of indemnity, passed by the governor, legislative council, and assembly of Jamaica, and approved by the queen. The plaintiff replied, that the defendant was then the governor of Jamaica, and was himself a necessary party to the passage of the act, and that the act could not have become a law without his assent as governor. To this replication the defendant demurred, and the demurrer was sustained. For the plaintiff it was argued that the defendant was legislating in his own behalf, and that he could not, by his own act, free himself from his liability. In the opinion of the court, by COCKBURN, Ch. J., he says, we have no hesitation in pronouncing the replication to be bad; that there is no ground whatever for saying that the governor of a colony cannot give his official consent to a legislative measure in which he may be individually interested. It might as well be said that the sovereign of these realms could not give assent to a bill in parliament in which the

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sovereign was personally concerned. A writ of error having been brought, the decision of the queen's bench was affirmed in the exchequer chamber, June 23, 1870, reported *Law Rep.* 6 Q. B. 1.

On this point, WILLES, J., said; the objection is founded upon a supposed analogy between legislative and judicial proceedings. In the latter the judgment of the interested judge is voidable, and liable to be set aside by prohibition, error, or appeal, as the case may be; but it is not absolutely void; and persons acting under the authority of such a judgment, before it is set aside by competent authority, would not be liable to be treated as trespassers. This was the opinion of the judges acted upon by the House of Lords, in *Dimes v. Grand Junction Canal Co.*, 3 H. L. C. 759-786; and in case of necessity, as where all the judges of a court having exclusive jurisdiction over a subject matter happen to be interested, the objection cannot prevail.

The supposed analogy between judicial and legislative proceedings is, moreover, imperfect. The governor is no more a party in the colonial act than the legislative council or house of assembly, or, in legal theory, every inhabitant of the island represented therein. If the objection were just in the case of the governor, then, by like reasoning, the crown could claim no benefit from any act of parliament; a result alike contrary to experience and reason.

The remaining question is, whether the sanction of the railroad commissioners was duly obtained.

As the case stands before us, it appears that there were three railroad commissioners, and that two only sanctioned the contract, and that the other neither met with his associates, nor was notified to do so.

This raises the simple question, whether, in the case of railroad commissioners, two of three could perform this act without any participation of the other, or notice to him.

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It is claimed by the plaintiff, that under section 14 of chapter 1 of the General Statutes, any two of the railroad commissioners may execute this duty. That section provides that "words purporting to give a joint authority to three or more public officers, shall give such authority to a majority of them, unless otherwise expressly declared." This is a substantial re-enactment of section 13 of chapter 1 of the Revised Statutes.

By law of February 8, 1791, N. H. Laws, ed. 1815, p. 247, a similar provision is made in respect to selectmen, viz: that "in all cases where anything in law is enjoined upon, or to be done by, the selectmen of any town or place, it shall be sufficient if done by the major part of such said selectmen;" and this provision is re-enacted in the laws of June 28, 1827, N. H. Laws, ed. 1829, p. 453-4.

The construction of this law has been settled in accordance with the obvious import of the language, in sundry decided cases: *Andover v. Grafton*, 7 *N. H.* 304, where it was laid down by PARKER, J., that a note given for a town, and signed by a majority of the selectmen, would bind the town.

In *Edgerly v. Emerson*, 23 *N. H.* 555-569, it was held that where, in a bank charter, the directors or any four of them are empowered to act, the action of the number would be valid whether the others were notified or not; and the court, by BELL, J., say, under the statute a major part of the board of selectmen could act, in the absence and without notice to the rest; and that it was the object of the statute to give this power.

So is *Butler v. Washburn*, 25 *N. H.* 256, in respect to selectmen. In *Hall v. Manchester*, 39 *Id.* 301, it was decided that the laying out a highway by two of the three selectmen was valid under our statute, although it did not appear that the other was present or acted. It was put upon the ground that by the statute a majority of the selectmen could act in all cases;

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at the same time it was held that the act of laying out the highway was of a judicial and of a public nature.

A similar construction has been given to laws providing for the approval of official bonds by the justices of the court of common pleas, or the superior court, as in the case of sheriffs. *Rev. Stat.* ch. 178, § 1. In such cases the practical construction has been that a majority of the justices might approve the bonds, and without meeting for that purpose; and now, by the General Statutes, chapter 198, section 2, it is expressly provided that the bonds of sheriffs shall be approved by a majority of the justices, but it has never been supposed that all or any should meet for that purpose. In the case of road commissioners or county commissioners, when laying out highways, it is settled that the board must be full to entitle them to act. It was so decided in *Palmer v. Conway*, 22 *N. H.* 144; but at the same time it was left undecided whether in case the board was full two could act without a meeting with or notice to the other.

The conclusion that the board must be full was undoubtedly reached upon the ground that such an intention was supposed to be manifested by the legislature, through the several provisions for filling any vacancy that might happen, even to allowing two to appoint some suitable person when the other fails to attend. These various provisions are cited by the court in *Palmer v. Conway*, as indicating the purpose of the legislature that the board should be full. A similar doctrine is held in *Mitchell v. Holderness*, 34 *N. H.* 213, and more recently in *Wentworth v. Farmington*, 49 *Id.* 119.

In the *Petition of Nashua*, 12 *N. H.* 425, decided in 1841, and before the provision in question in the Revised Statutes giving a majority power to act, it was held that the case must be heard and considered by all, and that all the members must be competent to act.

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So it was laid down that where several persons are appointed to act judicially in a public matter, all must meet and act in the matter, although a majority may decide.

In the case of *Palmer v. Conway*, it was left undecided whether the provision in Revised Statutes empowering a majority to act was designed to change the common law ; but in *Hall v. Manchester*, 39 *N. H.* 301, it was held that it did empower two of the selectmen to act without the aid or presence of the other, and so in that respect did change the common law rule ; and such, it is evident, must have been the views of the court in *Andover v. Grafton*, *Edgerly v. Emerson*, and *Butler v. Washburn*, and such, we think, is the plain and natural import of the language. As to road commissioners and county commissioners, the court have held that a full board was necessary ; but that, I think, is based upon the peculiar provisions of the statute, and especially the one enabling the two commissioners to appoint a third in case they find the other absent or unable to attend.

I think, however, that the plain language of the law, and the construction given in other cases, must prevail, and that a major part of the railroad commissioners may act.

It will be perceived, also, that one of the most important of the duties of railroad commissioners, namely, to examine the several railroads, may be done by one of the commissioners alone, to ascertain whether they have performed their duties, or violated their charters.

In *Sanborn v. Fellows*, 22 *N. H.* 490, where the law is carefully examined by BELL, J., in respect to disqualification of a judge by reason of interest, it was held that where one fence-viewer was interested, the others could act, they being a majority of the board, and empowered to act under the Revised Statutes, chapter 1, section 13. He says the other two have all

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the powers of the whole number, and the decision of the two would be free from this objection of interest. The court says that where powers are conferred on a board the majority may act.

So it is held, also (p. 48), that the duties of fence-viewers are chiefly judicial. So in *Keyser v. School District*, 35 *N. H.* 477, it was held that a committee of three, appointed by the district, were public officers, and that a majority could act for the whole—per *PERR-LEX*, Ch. J. A similar doctrine was held in relation to selectmen, in *Lyman v. Littleton*, 50 *N. H.* 42.

I am therefore brought to the conclusion that the directors of these two corporations had authority to make a contract to facilitate a business they were then legally doing, and in which they had a joint interest, extending even to giving to one road the use of the other for a period not exceeding five years, provided the contract was made in good faith, and not *designed to work a fundamental change* in the business of the corporations.

Whether it was made in good faith, or whether it was calculated to work such a fundamental change, requires such an extended examination of testimony and authorities, that, with the time at my command, I am not prepared to hazard an opinion, especially in view of the manner in which the present managers of the defendant corporation acquired the control over it, which, in my judgment, calls for more than usual caution in determining those questions.

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FISHER v. CONCORD RAILROAD.

50 *New Hampshire*, 200.

DOE, J.—In this case, the plaintiffs, Fisher and others (claiming to be and admitted by defendants' counsel in argument to be), stockholders of the Concord Railroad, having filed their bill against that corporation and its directors, treasurer, and clerk, move that the corporate property be allowed to remain in the hands of receivers, temporarily, until they can be heard on the merits of their case, in order that their rights may be preserved from impending danger. And, as to a part of that property, the court are agreed in granting the motion. The court are unanimously of opinion that the part of that property comprised in a certain judgment recovered by the corporation against a former conductor, should be held by a receiver; and a special order is made to-day, carrying that unanimous opinion into effect.

This order is made on evidence taken in another suit in which all of these defendants are parties in interest, and nearly all parties of record. No one doubts that this evidence can be considered on the present motion. *Ex parte* testimony is often heard on motions for temporary injunctions, and other interlocutory orders, which are sought in emergencies to preserve property provisionally, and to prevent damage until it can be decided, upon full investigation, whether the damage may rightfully be done. The evidence before us is free from the defects of *ex parte* testimony. There is no meritorious or equitable objection to it. The only objections are purely technical, and such as are never regarded on preliminary motions of this kind. Very

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nearly the whole of the material evidence on the present motion consists of the testimony of defendants and associates, and the whole of it was taken with full examination or cross-examination by their own counsel upon ample conference and deliberation.

This evidence, on which the order is made, shows that the present directors were elected upon an understanding with said conductor that, in consideration of his powerful aid in their election, the suit of the corporation against him should be dropped, or the judgment should not be enforced, or, in some way, he should be protected or indemnified against it at the expense of the corporation. They were elected upon an understanding that they would sacrifice the interests of the corporation in that suit. This understanding, for all practical and legal purposes, is equivalent to the most formal engagement and pledge. The judgment in that suit is a part of the property of the corporation. The evidence satisfies the court that, in regard to that part of the property, there is danger against which the plaintiffs are entitled to be protected by having that part held in the hands of a receiver. And the only remaining question, upon the present motion, is, whether, by the evidence, the court can draw such a distinction between that part of the property and the rest of it, as to be able to say that, although the former is in danger, the latter is not.

The plaintiffs are stockholders ; their suit is properly brought ; their motion is properly before the court ; the evidence is competent for the court to consider on the motion ; the evidence shows danger against which the plaintiffs are entitled to be protected ; the purposes of the directors are such that it is necessary to withhold from them a part of the corporate property. On these points there is no difference of opinion. The extent of the danger is the point on which the court are not unanimous. The part of the corporate property which

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is in undoubted danger, is several thousand dollars ; the rest of the corporate property is several millions. It being agreed that, as the evidence now stands, there is danger, and a necessity of avoiding it by holding the thousands in the custody of a receiver, the inquiry arises whether any part of the millions is in danger. It may be possible for millions to be perfectly safe where thousands would be in great peril. It may be in the power of imagination to suppose a case of one hundred and one dollars in a single trust, where a receiver would be necessary for the one dollar, and not for the hundred. The question now is, whether this is a case of that extraordinary kind. The answer to this question is to be found in the facts of the case.

Under the management of the former board of directors, the Concord Railroad rose to the highest prosperity allowed by law. It was paying ten per cent. dividends on the par value of the stock ; the payment of higher dividends was forbidden by the legislature. How much of this prosperity was due to a natural increase of the business of the road, and how much to its skillful and honest management, does not appear. But it does appear that the stockholders made no charges of mismanagement against the former board, and that if any such charges had been made, they would have been groundless. There was no apparent or suspected danger of any decrease of dividends or any depreciation of the value of the stock, under the management of the former board. One of the new board testifies that even "if a new road were constructed from Manchester to Concord," "in my judgment, the Concord road, with its present double track, splendid equipments, valuable property, and valuable leases, with judicious and economical management, and with the large increase of business that in all probability, will be drawn to it, it would pay ten per cent." The management of the former board was judicious and

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economical. So far as the interests of the stockholders were concerned, there was no chance for improvement. The road was at the summit of lawful success. This was so palpable that the present board say they do not intend or hope to increase the dividends or the stock ; and they could not increase either without violating the law. The stockholders, whose interests were identical with those of the corporation—the stockholders who had a purely stockholding interest—were perfectly satisfied, and there was every reason why they should be.

The former conductor was not satisfied. He owned a large amount of the stock, but his peculiar position rendered him hostile, in the highest degree, to the real stockholding interest. He had been discharged from the service of the corporation for alleged embezzlement of its money. A suit brought against him by the corporation to recover the money had been tried, and the result was adverse to him. A judgment against him was inevitable, and it was close upon him. More than two months before the election of the present directors, it had been decided by this court that judgment must be rendered against him, notwithstanding his vigorous effort to postpone the decision till after that election. His escape depended upon his organizing a party to buy stock, turn out the old board of directors, and elect a new board upon an understanding that he should be relieved from the judgment, or in some way indemnified against it, at the expense of the corporation. Such a party was formed, stock was bought, and, upon such an understanding, the present board was elected, the former conductor leading the movement, and voting for them upon fourteen hundred and two shares. Not one of the directors pretends to doubt the legality of the justice of the judgment from which they have conspired to rescue him.

It was not to be expected that he could raise a

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sufficient force, for such a purpose, among the old stockholders who felt that the interests of the road were their interests, and that his high-handed rescue from such a judgment would be a greater disaster than the loss of the money involved in it. The new board apparently consisted of seven persons; really it consisted of six; the seventh was merely a nominal member. When the movement to elect them was started, a short time before the election, the six had no appreciable interest in the corporation. One of them owned no more than four shares; another owned no more than two shares; and the other four were not stockholders.

This feature gave their enterprise so unfavorable an aspect that it was deemed necessary to bring in an old stockholder as a candidate to give an appearance to their ticket. It was understood that this seventh member was merely to appear to be a member. He was ostensibly put forward as a candidate for the office of director when it had been privately arranged that he was to be a mere titular director. He was publicly held out as a candidate for the office of president of the road, when it had been secretly contrived that he was to be a mere honorary and temporary president, speedily to resign and retire from the board, and to take no active part at any time in the management of any of the affairs of the corporation.

The nominal candidate owned two hundred shares of the stock; and the par value of a share was fifty dollars. It was thought advisable that he should appear to own a larger amount. Three hundred shares were, in form, transferred to his name. He gave a check for the amount of their par value when it was known that his associates were paying, in the public market, about seventy per cent. above par, at which price these three hundred shares had just been bought by one of the six. At the election, when he voted on these three hundred shares, he made oath be-

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fore a justice of the peace, as required by law (*Gen. Stat.* ch. 134, § 19), that he was the absolute and *bona fide* owner of them. Soon after the election, his check was returned to him, and the three hundred shares were returned to their owner, according to the original understanding. Here was a plain and very grave violation of law, committed for the purpose of giving a fictitious interest to a fictitious president whose name was used to give the new board delusive strength. This elaborate fiction shows how their previous want of interest in the road looked to them, what they thought it was evidence of, and how much they felt its force; and the court cannot be any less impressed by it than they were. They did not seek the control of the road for the purpose of protecting or advancing their interests as stockholders; they became stockholders for the purpose of obtaining the control of the road. This fact was calculated to raise a suspicion so heavy that, in their judgment, it was necessary to take such pains, and use such means, to conceal the fact even partially under cover of a pretended president. The fact thus attempted to be concealed, must have been, in their judgment, entitled to great weight against themselves; and it is entitled to as much weight in our judgment as in theirs.

The six real directors had no experience in the management of a railroad, and no substantial interest in this road until they purchased shares immediately before the election for the purpose of carrying the election. Then they and their friends bought a large amount. One of their agents, who bought "about five thousand shares" for them, testifies that "the average price per share" was "between eighty-four and eighty-five dollars." Their treasurer testifies, "some ten thousand shares were purchased by the whole, which would average, I think, at about eighty-five dollars, or from eighty-three to eighty-five dollars." Stock was

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bought to the amount of more than eight hundred thousand dollars, to carry the election. The evidence is indistinct as to the precise number of dollars borrowed for the purpose of buying the stock ; but, upon the evidence, there is no doubt that nearly the whole amount was so borrowed. The affair was not a natural and gradual overflow of surplus earnings or accumulating capital accidentally uniting in a single channel ; it was a spasmodic use of hired money in a joint project of large proportions and unusual character. Hired money may seek investment in railroad stock ; but this amount of hired money, in sudden concert, seeking investment in a single New Hampshire railroad, at a price carrying the interest below six per cent., with no probability of a profitable, legitimate speculation, and the investors denying on oath, as they do, all purposes of speculating or increasing the dividends or the stock, this is something not in the ordinary course of business.

To increase their facilities for borrowing money, it was deemed expedient to enlist managers of banks in the enterprise ; and numerous and large sums were obtained in this way. This perversion of banks was accompanied by various irregularities in disregard of sound banking policy, and of the laws of New Hampshire and of the United States. The funds and property of savings banks, in various parts of the State, were used by the managers of those institutions to make themselves and their associates managers of the Concord Railroad,—a transaction to be examined in two aspects.

In the first place, a savings bank is created by the legislature for a definite and limited object. It is not chartered as an elevator for lifting its managers to other places of honor or emolument. Its sole object is the preservation and increase of the savings of the depositors, even the accommodation of borrowers being

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merely incidental. And when the agency established by law for that purpose, is diverted, by the managers, to the purpose of acquiring for themselves the control of other corporations, there is a breach of trust and a subversion of the object of the legislature. This revolution overthrows the fundamental principle and changes the nature of savings banks, in which the public have a deep interest. It is a usurpation to be discountenanced and resisted whenever it appears in the administration of the law. The strict law on the subject is abundantly supported by practical considerations. The general use of the funds of savings banks for the accumulation of corporate power in the hands of their managers, cannot be contemplated without serious alarm. And in view of the magnitude of the danger arising from the present and prospective amount of such funds and such power, it would be unfortunate if the abuse should be encouraged by the inaction and silence of courts.

In the second place, at common law, an agent or trustee, when authorized to sell property, cannot sell it to himself; when authorized to buy property, cannot buy it of himself; when authorized to loan money, cannot loan it to himself. This incapacity is a universal principle of law. It does not need to be published in the charters of banks; it is the law of the land. It is founded upon a general policy; is not shown by proof of fraud in a particular case; and is not avoided by proof of good faith and fortunate results. *Exp. James*, 8 Ves. 345; *Davoue v. Fanning*, 2 Johns. Ch. 260. It is an old elementary and familiar principle, established and maintained by the reason and experience of mankind. In making a sale, it is the duty of an agent or trustee to sell as high as possible; if he sells to himself, it is his interest to sell low. In making a purchase, it is his duty to buy as low as possible; if he buys of himself, it is his interest to buy high. In making a loan, it is his duty to obtain as high a legal

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rate as possible, and good security; if he loans to himself, it is his interest to take a low rate, and it may be his interest to take poor security. It is a violation of the confidence placed in him, to expose himself to temptation by bringing his personal interest in conflict with his fiduciary duty. However possible, or probable, or certain it might be, in a particular instance, that he would not feel, or would resist, the temptation, "he ought not," says Chief Justice RICHARDSON, "to be permitted to act where the temptation exists." *Perkins v. Thompson*, 3 *N. H.* 146. "He cannot," says the supreme court of the United States, "represent in himself two opposite and conflicting interests. . . . The law has wisely prohibited any person from assuming such dangerous and incompatible characters." *Wormley v. Wormley*, 8 *Wheat.* 441. "The policy of the rule," says Chancellor KENT, "is to shut the door against temptation." 4 *Kent Com.* 438.

If an agent or trustee, directly or indirectly, uses or manages for his own benefit, the property, authority or business committed to his charge, he is unfaithful; and it is no justification and no extenuation for him to show that no loss has happened. The violation of law is not in his meeting with a loss, and being unable to make restitution. The breach of trust is not in his bad luck. And any attempt to palliate his wrong by his accidental ability to restore what he was legally disabled to take, is calculated to weaken the sense of legal obligation, and to undermine the whole doctrine, the whole duty, and the whole safety of trusts. There is nothing peculiar in this age or this country to justify any relaxation of the ancient and stringent law on this subject. 2 *Kent Com.* 229, 618; 4 *Id.* 307; 1 *Story Eq.* §§ 258, 307, 315, 316, 322; 1 *Pars. Cont.* 86, 87, 5 ed.; *Michoud v. Girod*, 4 *How. U. S.* 503, 553-557; *Currier v. Green*, 2 *N. H.* 225; *Holton v. Smith*, 7 *N. H.* 451;

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Martin v. Moulton, 8 *N. H.* 506 ; Sparhawk v. Allen, 21 *N. H.* 9, 22-24 ; French v. Currier, 47 *N. H.* 98.

The law was well understood by the new board and their associates. The note of the manager of bank A., for forty-two thousand five hundred dollars, was given to bank B. ; the note of the manager of bank B., for forty-two thousand five hundred dollars was given to bank A. The mutuality of the loan deprived the funds of the disinterested and undivided fidelity of guardianship provided by law. The guards disarmed themselves. The circumlocution of their notes shows their knowledge of the law, and a premeditated purpose to elude it. With the eighty-five thousand dollars, trust funds, thus illegally loaned by the managers to themselves, they bought Concord Railroad stock in furtherance of the common design. And there were other flagrant violations of law in obtaining other sums for the same purpose. Bank funds were taken by their managers under cover of the names of other persons. Various devices were resorted to.

The legislature immediately investigated these proceedings, and passed a special act to guard savings banks against the danger of their officers loaning to themselves the funds of the bank. Ten days after the passage of that act, it was set at naught by the six real directors and four of their associates. One of them, whose shares cost more than two hundred thousand dollars, called upon the others to assist him in carrying his burden. A note for one hundred thousand dollars, signed by all those ten persons except the manager of bank A., was given to bank A. ; another note for one hundred thousand dollars, signed by all except the manager of bank B, was given to bank B. With the two hundred thousand dollars thus raised, this part of their burdensome investment was laboriously carried further on. These two notes display the same knowledge and disregard of the law, that had been pre-

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viously exhibited, and show that all the real members of the new board considered their combination superior to all legal restraint.

The erroneous belief that a manager of a corporation, or any other agent or trustee, can evade his duty, circumvent the law of trusts, and use or manage the trust property for his own profit or advantage under any specious pretense or ingenious subterfuge, is a dangerous opinion for such a person to entertain. And the fact that he entertains and acts upon such an opinion in one trust, for the purpose of grasping another trust, is evidence tending to show that the latter would be in danger in his hands. When managers of banks use the trust funds to gain the control of a railroad for themselves and their friends and not for the banks, it is a natural conclusion that the railroad will be managed on the same plan. And the former conductor and his first adherents, who enticed into their scheme the managers of banks to be used in obtaining trust funds in violation of law, are not less responsible than the recruits whom they enlisted for that service.

The price paid for the railway stock, was so great that ten per cent. dividends on the par value would be less than six per cent. interest on the price. It is proved that the market rate of interest was not less than seven or seven and a half per cent., and that the banks were accustomed to take the market rate. For money hired from other sources than the banks which they controlled, of course more than six per cent. interest was paid. As to the money hired of those banks, the view most unfavorable to the defendants, would be, that they loaned bank money to themselves and their associates at a lower rate of interest than that taken from other borrowers. If they engaged or participated in any favoritism, or speculation of that kind to gain the control of the railroad, it could not be claimed that the

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railroad would be safe in their hands. But there is positive testimony that, on several of their bank loans, the interest was to be the market rate; and they are entitled to the presumption that it was so in all cases. That is the view most favorable to them. Taking it to be the correct view, they knew that the highest interest they could receive from the railroad stock, would be less than the interest they paid for the hired money with which they bought the stock.

They bought the stock with a mutual understanding, and were careful not to bid against each other; but their eager demand for it at once carried up the price about twenty per cent. There was no prospect, under legal management, that the price paid by them would be maintained, unless by suspicious struggles of factions for the control of the road, a contingency upon which they did not rely. They paid more for the stock than they thought it would be worth in the market. They do not pretend that they had any hope of gain in a higher price; but they say they intended to keep the stock and not to sell it; and the future price would be of less consequence in a permanent investment than in a speculation. What were they going to keep it for?

If it had been legally possible to increase the dividends or the stock, the new board and their friends might have bought their stock for speculative purposes in that direction. But this was legally impossible; and they deny that they had any such object in view. What, then, was their object? They were not engaged in an artless and aimless scheme. There was a great outlay of money, time, skill, and exertion; and it was not made upon a manifestly useless and unprofitable undertaking. There must have been an object of great consequence to be accomplished, besides the rescue of the former conductor, and they must be able to inform us what it was. They have

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testified on this point. With one voice they say they meditated an investment. As the investment was made in expectation of a loss of principal and a loss of interest, and was chiefly of money hired for the purpose of being invested at a loss, it is evident that, on this vital point, their testimony is highly figurative. On their oaths, explaining conduct that so much needs explanation, they declare their object was an investment, which, in the ordinary meaning of the term, was inconsistent with any rational system of finance. The use of so common and plain a word in a sense so eccentric and obscure, agrees with the other evidence in pointing to an investment with mysterious profits.

Two of the directors give further explanations. One, whose shares cost more than one hundred thousand dollars of hired money, says that, in addition to the stimulus of an investment, he "felt a desire to be in control of the road, for the same reasons that men usually have, to be in power." Another, who sold his wife's government bonds to raise money for this enterprise, and "cannot state" how much hired money he used in buying shares at cost of more than one hundred thousand dollars, says that his purposes in buying them were, "First, for an investment; second, to do all I could to prevent consolidation;" that, in his judgment, "consolidation would very seriously affect the local business of Concord and Manchester, and other places, and the interests of the people of New Hampshire;" and that he was "apprehensive that consolidation would be effected unless some movement of the kind which" he "made was attempted." Other directors say they are opposed to consolidation. but do not claim that the prevention of it was one of their motives for seeking the control of the road.

It appears in the evidence that the Concord Railroad controls four other railroads with which it is consolidated. Estimated by the size of the State, this is a

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consolidation of great magnitude ; but no one of the directors has any wish or intention to break it up. It also appears in the evidence that the Concord Railroad and the Manchester & Lawrence Railroad are naturally rival and competing roads ; that the people of Concord and Manchester, and all whose channels of business pass through Concord or Manchester to Boston (comprising a large portion of the State), are interested in requiring those two roads to run as independent lines according to their charters ; that their consolidation has been, and is, a cause of complaint ; that the legislature have undertaken to dissolve it by a law made for that purpose ; and that a suit has been brought to put that law in force. That suit, every one of the directors intends to contest. When it comes to trial, a different state of things may appear ; but the evidence in this case is, that the people of New Hampshire have condemned this consolidation as an oppressive and illegal monopoly and a public evil, and decreed its overthrow by positive legislation. But the director, who claims that he volunteered to defend them against a consolidation not in existence, proposes to defend the existing one against them. The philanthropy of the movement is one of the explanations that needs to be explained.

Such is the testimony of the directors on the object of their combination and struggle. It decisively corroborates the other evidence in proving that their object was a system of railroad management irregularly and wrongfully turned to the benefit of the managers and their associates.

And the testimony of their associates tends to the same conclusion. The effect of all their testimony is exemplified by one who hired "about seventeen thousand dollars" of a bank under their control to buy Concord Railroad shares, and pledged them to the bank to secure the loan, and voted on them for the present directors. He testifies that he did not buy the

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shares "for the purpose of voting on them for a new board of directors," and that there was not "any understanding or expectation," that, in the event of the election of a new board, he was "to be employed as an attorney for the corporation, or in any other capacity." He also says, "I paid from eighty-three to eighty-five dollars per share, . . . and for a permanent investment I regarded it as one of the best which a man could make, should he be taken away from his family." It is not unusual for thoughtful persons, preparing for the close of life, to pay their debts, and settle their worldly affairs; but running in debt for a losing investment incumbered beyond its value—entangling the man's business in such unaccountable embarrassment—as a preparation for being taken away from his family, is a dark explanation, equally solemn in form, and mysterious in substance.

These are the facts of the case. If there had been any other facts having any bearing against the plaintiffs or in favor of the defendants, we must presume they would have been proved, or that time for proving them would have been asked, before the question arising on this motion was submitted by the defendants to the court for decision. The whole motion must be decided, as a part of it has been decided, upon the evidence. In the proved facts, is to be found the answer to the question whether this is a case in which millions are perfectly safe while thousands are in such peril as to require the protection of a receiver. Upon these facts, the conclusion must be, that this is not a case of that extraordinary kind.

How is so plain a conclusion to be avoided? Are the court to disregard the evidence, and introduce the novel practice of deciding on their personal knowledge of the parties? Nothing could be more illegal; scarcely anything could expose the impartiality of justice to to a greater risk. The equality of the law does not

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recognize one party as a friend, and another as a stranger. Judicial notice may be taken of certain matters of public history and general knowledge; but the character of a party in a suit is not one of those matters. The court must try a case, as a jury would be sworn to try it, by the law and the evidence. If a juror has any personal knowledge of a party which would be admissible in evidence, the juror's personal knowledge does not become evidence, and cannot be taken into consideration, unless he testifies to it under oath, and submits himself as a witness to cross-examination. 3 *Blacks. Com.* 375; *Bac. Abr.* title "Juries" (M); O. G. L. & Co. v. Graham, 28 *Ill.* 73, 79. And a judge must come under the same rule. The primary principles and simplest rudiments of the law, forbid the court to act judicially upon any knowledge of the parties except that furnished by the evidence. Moreover, if a judge has any competent testimony to give on that point, and he gives it, there must be an opportunity to rebut it. Is he then to weigh his own testimony against that of other witnesses? "It seems now to be agreed that the same person cannot be both witness and judge in a cause which is on trial before him." 1 *Greenl. Ev.* § 364. But, if the court had any personal knowledge of these parties, and had testified on that point, and acted on their own testimony in coming to their unanimous conclusion that the thousands are in such peril as to require the protection of a receiver, there would be a difficulty in finding, on the same testimony, that the millions are perfectly safe without that protection.

The argument that the directors had a legal right to buy stock and gain the control of the corporate property for legitimate purposes, has been disposed of by the unanimous order of the court, this day made, specially withholding from them a part of that property. The argument does not reach this motion which raises

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the question of the purposes for which they sought the control. The former conductor had a legal right to buy stock; but an extensive exercise of that right might have been evidence on the trial of his case. And the extraordinary circumstances attending the purchase of stock in this case, throw a light upon the designs of the purchasers.

The argument that, as the directors own a large amount of the stock of the corporation, they can have no motive to misappropriate its funds, has also been decided by the unanimous order. If they owned all the stock, they could have no such motive; but their understanding with the former conductor, which imperils the thousands, shows that their ownership of a part of the stock, is not a sufficient security for the other stockholders. And their situation may be illustrated by his. On the trial of his case, his ownership of a large amount of the stock could not have been regarded as evidence that he had no motive or interest to keep the funds of the road. *B. & W. R. R. v. Dana*, 1 *Gray*, 101, 102.

To the argument that the plaintiffs do not own as many shares as the directors, the reply was made by counsel, that a single share is as much entitled to the protection of the law as any number. The directors seem to think that the road practically belongs to them and their friends, and that the interests of the other stockholders are entirely at their mercy. Such a mistake is not to be encouraged. The majority of voters in a town meeting do not own the town property, and have not an unlimited power to dispose of it; the law defends the poorest tax-payer against their wrongful proceedings. *Brown v. Marsh*, 21 *N. H.* 81. The same doctrine is applicable to other corporations, and has been applied, by this court, to a railroad, in a case where there was no actual fraud or intentional wrong, but merely an intention of the directors to act in good

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faith, upon views of the law held by the court to be erroneous. *Marsh v. E. R. R. Co.*, 40 *N. H.* 515, 531, 532. The same doctrine is applied by the court to a part of the corporate property in this case.

The plaintiffs have interests to be protected, beyond ten per cent. dividends for the time being. As the commercial, mercantile, manufacturing, and agricultural industry of the country, the cost of the common necessities of life, and nearly all kinds of property, are affected by the cost of railroad transportation; that cost is a matter of great concern to the public. It is the theory of New Hampshire law, that a railroad is a public highway, designed, and put in operation, by legislative authority, for the public accommodation; that its managers are public servants; and that a rate of fare or freight, higher than is necessary for paying ten per cent. and keeping the road in a reasonable repair and a suitable condition for public use, is an oppressive public tax assessed and collected by a corporate monopoly, created by the legislature. *Gen. Stat.* ch. 146, §§ 1, 2, 3; ch. 144, § 5. If the increasing business of this road would enable the directors to carry out their plans, and, at the same time, to pay the stockholders ten per cent. dividends, a stockholder would have as clear a right to complain as if he received but five per cent. He would have a right to complain, that the rates of fare and freight were not constantly reduced to the standard of ten per cent. and necessary expenses, because earnings of the road misapplied by the directors would be that oppressive public tax which is likely to arouse indignation and provoke legislation unfriendly to railroad interests. That is a danger against which each stockholder has a right to be protected; and that is one of the dangers in this case. Such a danger is not avoided by a reduction of rates, unless the reduction constantly reaches the point required by the policy of New Hampshire law.

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Whether it reaches that point must always be an open question, depending on the amount of business, and the use made of the road and its earnings by the directors.

If the directors should turn over to the former conductor, an amount equal to the judgment against him, and still pay ten per cent. dividend, that amount would be an oppressive tax illegally levied by them, on the public, for the benefit of that conductor. They were employed by him to levy that tax. If the road were put into their hands, what would hinder their levying the tax according to agreement? Withholding from them nothing but the judgment and its proceeds, would, as a legal measure, be a vain and idle ceremony. If it would have any practical effect, it would merely furnish them with a pretext for refusing to give him his stipulated share of the spoil. That would be an illusory and inadequate remedy for the plaintiffs, who are entitled to effectual and complete redress if they are entitled to any.

In the present state of things, the plaintiffs have a remedy which is sufficient for them and injurious to no one. The road is in the safe custody of the law, where it has been for several months. And the plaintiffs ask that it be allowed to remain there, temporarily, until they can be finally heard on the merits of their case, in order that their rights may be preserved from impending danger. Their case can undoubtedly be brought to a final decision within a few months; and their motion for continued protection, during that time, against the dangers shown by the evidence to exist, is a reasonable motion and ought to be granted; and no order ought to be made that would deprive them of the protection which they are now enjoying, and to which the evidence shows them entitled. If the present receivers are not acceptable to all parties, others can be appointed in

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their place, whose management of the road during that time will be satisfactory to all whom it may concern.

On the final hearing such a decree should be made as the evidence then offered shall require. If the evidence then offered makes a different case,—if it shall then appear that the plaintiffs have no rights, or that their rights are not in danger,—their bill should be dismissed, and the road should go into the hands of the directors. But if it shall then appear, as it now appears, that the plaintiffs have rights which are endangered by a conspiracy to manage the road for the illicit benefit of the managers and their friends, the plaintiffs will be entitled to protection as long as the danger continues. If it shall then appear that such a conspiracy has been abandoned on account of the exposure made of it by the evidence, such a state of things should be duly considered.

We are admonished that courts ought to be slow to interfere in cases of this kind. Unfortunately there is a precedent which might be cited in support of this admonition. There is a case in another jurisdiction in which courts have been slow to suppress a corporate management illicitly directed to the benefit of the managers, and in which a peculiar system of railroad principles has been rapidly developed. A dominion of railroad directors arose on a foundation of fraud, intimidation, and corruption. It perverted corporate power and personal trust, trampled down the rights of stockholders and the public, defied the law, absorbed the local government, overwhelmed a powerful State, and spread the demoralizing influence of its success. In resisting the extension of such a system, it is not the duty of the court to be slow.

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NORTH MISSOURI RAILROAD COMPANY v.
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49 Missouri, 490.

Revenue. North Missouri R. R. Ordinance of 1865 constitutional. The convention ordinance of 1865, providing that an annual tax of ten and fifteen per cent. of the gross earnings of the North Missouri Railroad Company should be paid to the State in lieu of other taxation, and applied in payment of the debt due from the State on the bonds issued by the State to that company, is not repugnant to the constitution of the United States in any of the following particulars:

1. It does not violate articles 5 and 7 of the amendments of the United States constitution. Those articles were not designed as limitations upon State governments in respect to their own citizens, but exclusively as restrictions upon federal power.

2. The act of February 16, 1865, providing that the mortgage of the State on the North Missouri Railroad, taken to secure the amount guaranteed by the State to aid in the completion of the road, should be released and made a second lien, was a contract with the State. But the ordinance of 1865, referred to, did not impair the obligation of that contract between the railroad and the State. There is nothing in that act to prevent the State from exercising the sovereign right of taxation. The act does not pretend to grant exemption from taxation in express terms, and the courts will never presume that the State intends such exemption. Obviously the matter of taxation did not enter in the act, but was left where it was found before.

3. The ordinance is not unconstitutional by virtue of the clause imposing uniform taxation on all property. The ordinance itself is a part of the constitution, and cannot be nullified by the more general provision relating to the subject of taxation.

4. The ordinance of 1865 is not unconstitutional on the ground that the assessment is not in the nature of a tax. Although not levied and obtained directly for purposes of revenue, the assessment is a tax. It was raised for the purpose of paying the State's indebtedness. When money is once raised by taxation it is revenue, without regard to the purpose to which it is appropriated or applied.

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Revenue. Taxation, unequal. Legislation. The right of determining what proportion of the burdens of taxation shall be borne by any individual or class of individuals must be determined by the legislature, when there is no constitutional restriction. And the remedy, in case of unjust legislation, is to be found among the constituents of the legislators, and not in the judiciary.

Appeal from St. Charles circuit court.

R. E. Rombauer, for appellant.—The ordinance “for the payment of the State and railroad indebtedness,” adopted by the people of the State of Missouri in convention, April 8, 1865, is not in contravention of any provision of the constitution of the United States. It is not in violation of article 5 of the amendments to the constitution, because the restrictions imposed on legislation by that article are applicable to the government created by that instrument only, and are not applicable to the States. *Barron v. Mayor, &c. of Baltimore*, 7 *Pet.* 243; *Withers v. Buckley*, 20 *How.* 84, 91. That ordinance is not in violation of section 10 of article 1 of the constitution of the United States, impairing the obligation of no contract.

At the date of the passage of the act of February 15, 1865, the North Missouri Railroad Company possessed no charter exemption from taxation. That act did not pretend to grant any exemption from taxation in expressed terms, and such exemption can never be presumed. *Providence Bank v. Billings*, 4 *Pet.* 561, 562; *Gordon v. Appeal Tax Court*, 3 *How.* 133; *Christ Church v. Philadelphia*, 24 *Id.* 300; *Jefferson Branch Bank v. Kelly*, 1 *Black*, 447; *Philadelphia & Wilmington R. R. v. Maryland*, 10 *How.* 376; *Washington University v. Rowse*, 42 *Mo.* 321.

Even the legislature may repeal a temporary rate of taxation, and impose another and higher rate, or ad-

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ditional taxes, by virtue of the State sovereignty over the whole subject of taxation, unless there has been some express contract in limitation of the power. *St. Joseph v. Hann. & St. Jo. R. R. Co.*, 39 *Mo.* 496; *Ohio Life Ins. & Trust Co. v. De Bolt*, 16 *How.* 416, 435, 436; *Easton Bank v. Commonwealth*, 10 *Barr.* 442, 450. How much more so may the sovereign power of a State in convention assembled do so, on whom in the very nature of things there can be no constitutional restraint, except such as is found in the constitution of the United States.

All contracts are made subject to the sovereign power of taxation vested in the people, which, like sovereign power of every description, is trusted to the discretion of those who use it. *McCulloch v. Maryland*, 4 *Wheat.* 429, 430; *Herrick v. Randolph*, 13 *Vt.* 529; *Town of Guilford v. Cornell*, 13 *Barb.* 615; 13 *N. Y.* 143; *Sharpless v. Mayor of Philadelphia*, 9 *Harris*, 147; *McSpeddon v. Baker*, 34 *Barb.* 69; *Attorney General v. Winnebago R. R. Co.*, 11 *Wis.* 42, 45; *Hamilton v. St. Louis County Court*, 15 *Mo.* 22, 23; *Mager v. Grima*, 8 *How.* 490; *People v. Lawrence*, 36 *How.* 177; *Sill v. Village of Corning*, 15 *N. Y.* 303; *People v. Draper*, 15 *N. Y.* 549; *Langhorn v. Robinson*, 20 *Gratt.* 661.

When unrestricted by the constitution of the United States, the power of the people of the United States is like the transcendent power of the British parliament. *Wilkinson v. Leland*, 2 *Pet.* 657-8; *Bonaparte v. Camden & Amboy R. R.*, 1 *Baldw.* 220; *Farmers' & Mechanics' Bank v. Commissioners*, 3 *Serg. & R.* 68; *Calder v. Bull*, 3 *Dall.* 386; *Bank v. Commissioners*, 2 *Black*, 620; *District of the city of Pittsburg*, 2 *Watts*, 323. It is a fallacy to suppose that because the act of 1865 provides for a distribution of the earnings of the road in a certain order, that therefore the convention ordinance providing for a tax on the gross earnings in-

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terfered with that distribution. All taxes imposed on the road were necessarily part of the "actual and current expenditures of the railroad," which, by the terms of the act of February 15, 1865, were to be paid first, and prior to all other things.

A tax on gross earnings is but a usual and well-known mode of taxation. *Laws of U. S.* 1863-4, pp. 285-6; 2 *Redf. Railw.* § 228; Southern Ex. Co. v. Hood, 15 *Rich.* 66; State v. Hood, *Id.* 177.

The parties complaining in this court of a violation of the contract are not the bondholders, but the corporation—a party which, by the very terms of the act of 1865, is the last distributee in the order of the distribution of the funds, and whose rights are not interfered with in any view of the case.

Orrick & Emmons, for respondent.—I. The ordinance of the State convention of April 8, 1865, in providing another and different mode of enforcing the payment of the indebtedness of respondent to the State than that provided by the act of February 16, 1865, is unconstitutional and void: 1. Because it impairs the obligation of the contract entered into between the State and respondent by the act of February 16, 1865, without the consent of the respondent, which declared that "this act shall be and become of full force and binding effect upon said corporation and the State of Missouri." *Dartmouth College v. Woodward*, 4 *Wheat.* 519; *Trustees Vincennes University v. Indiana*, 14 *How.* 268; *Planters' Bank v. Sharp*, 6 *Id.* 301; *Piqua Bank v. Knoop*, 16 *Id.* 369; *Binghampton Bridge Case*, 3 *Wall.* 51; *Norris v. Trustees of Abingdon Academy*, 7 *Gill & J.* 7; *Grammar School v. Burt*, 11 *Vt.* 632; *Brown v. Hummel*, 6 *Pa. St.* 86; *State v. Heyward*, 3 *Rich.* 389; *People v. Manhattan Co.*, 9 *Wend.* 351. 2. Because the action of the convention in adopting the ordinance was an assumption of

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judicial authority by a body purely legislative, in which it determined the rights of the State and the liabilities of the corporation; named and decreed the manner and extent of the payments to be made. *Newland v. Marsh*, 19 *Ill.* 82; *Ervine's Appeal*, 16 *Pa. St.* 266; *Greenough v. Greenough*, 11 *Id.* 494; *Dechastellux v. Fairchild*, 15 *Id.* 18. 3. Because the ordinance assumes that at the time of its passage there was due from the North Missouri Railroad Company to the State principal and interest upon certain bonds, the payment of which was guaranteed by the State, without giving the respondent an opportunity to dispute the fact of indebtedness and have the issue tried by a jury. *Bank of Missouri v. Anderson*, 1 *Mo.* 244. 4. Because the ten per cent. assessment upon the gross earnings of the North Missouri Railroad Company was not levied for the purpose of revenue, but to pay a debt which the said company owed the State by reason of the advances the State had made in the payment of guaranteed bonds or the coupons attached, and to provide for future payments which the State might be called upon to make when the remaining bonds and coupons matured. *City of Carondelet v. Picot*, 38 *Mo.* 130; *Glasgow v. Rowse*, 43 *Id.* 489; 41 *Ill.* 306; 48 *Id.* 172; 15 *B. Monr.* 498; 12 *Allen*, 504; 16 *Mich.* 269. 5. Because, if it cannot be sustained as a tax, the ordinance seeks to deprive the respondent of their property without due process of law by a legislative judgment. 2 *Yeager*, 269-70; 10 *Id.* 59; 3 *Scam.* 238.

II. The levy upon and seizure of respondent's property by appellant as collector of St. Louis county, is not authorized by the terms of the ordinance, as section 4 specifically declares that, should the bonds or any part thereof remain due and unpaid, the general assembly shall provide by law for the sale of the railroad and other property, and the franchises of the company that shall thus be in default, and shall appropriate the

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proceeds of such sale to the payment of the amount remaining due and unpaid from said company.

BY THE COURT.—WAGNER, J.—This case comes here for review on appeal from the St. Charles circuit court, before which the parties voluntarily appeared, submitting the matters in controversy between them on an agreed statement of facts. The court entered judgment for plaintiffs, and it is to reverse that judgment that this appeal is prosecuted.

Whilst some minor and incidental matters have been discussed, the real questions presented by the record all resolve themselves into one, namely, the validity of the convention ordinance of April, 1865, relating to railroad indebtedness. The first section of the ordinance—and this is all that is material to be here noticed—provides that “there shall be levied and collected from the Pacific Railroad, the North Missouri Railroad, and the St. Louis & Iron Mountain Railroad companies, an annual tax of ten per centum of all their gross receipts for the transportation of freight and passengers (not including amounts received from and taxes paid to the United States) from October 1, 1866, to October 1, 1868, and fifteen per centum thereafter; which tax shall be assessed and collected in the county of St. Louis, in the same manner as other State taxes are assessed and collected, and shall be appropriated by the general assembly to the payment of the principal and interest now due, or hereafter to become due, upon the bonds of the State, and the bonds guaranteed by the State, issued to the aforesaid railroad companies.”

The tax specified in the ordinance was to be collected from each company only for the payment of the principal and interest on the bonds, for the payment of which each company was liable; and whenever such bonds

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and interest were fully paid, then no further tax was to be collected from the company.

The objections urged against the ordinance, and contained in the agreed case, are that it is unconstitutional ; that it violates the fifth and seventh amendments to the constitution of the United States, and that it is also opposed to that provision which declares that no State shall pass any law impairing the obligation of a contract.

The position assumed, that the ordinance is invalid because it is repugnant to the amendments designated, cannot be maintained. By a series of adjudications in the national courts it has been definitely settled that these amendments are limitations of power on the general government, and have no application to the States.

In the case of *Barron v. City of Baltimore*, 7 *Pet.* 243, the whole question was fully considered and ably examined upon a writ of error to the court of appeals of the State of Maryland. The error alleged was that the State court sustained the action of the defendant under an act of the State legislature, whereby the property of the plaintiff was taken for public use in violation of the fifth amendment. The court held that its appellate jurisdiction did not extend to the case presented by the writ of error, and Chief Justice MARSHALL, declaring the unanimous judgment of the court, said : "The question presented is, we think, of great importance, but not of much difficulty. . . . The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United

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States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes." And, in conclusion, after a thorough examination of the several amendments which had then (1833) been adopted, he observes: "These amendments contain no expression indicating an intention to apply them to State governments. This court cannot so apply them."

That the amendments "were not designed as limits upon the State governments in reference to their own citizens," but "exclusively as restrictions upon Federal power," was declared in *Fox v. Ohio*, 5 *How.* 434, to be "the only rational and intelligible interpretation which these amendments can have." And language equally decisive may be found in *Smith v. State of Maryland*, 18 *How.* 76, and *Waters v. Buckley*, 20 *Id.* 90. The same doctrine is confirmed in the recent case of *Twichell v. Commonwealth*, 7 *Wall.* 321, where it is said, "the scope and application of those amendments are no longer subjects of discussion."

But the main question is whether the ordinance violates or impairs any contract entered into between the State and the company antecedent to its adoption. It is conceded that there was no law prohibiting the State from taxing the company, provided the right was not waived by the enactment which will now be referred to.

The plaintiff here, the North Missouri Railroad Company, made default in the payment of the interest on the bonds guaranteed by the State, and by the pro-

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visions of an act of the legislature, approved January 16, 1865, entitled "An act to provide for the completion of the North Missouri Railroad and its West Branch, and for the construction of a bridge over the Missouri river," the mortgage or first lien of the State was released for four million three hundred and fifty thousand dollars (the amount which the State had guaranteed for the company), and made a second lien, in order that six million dollars of the first mortgage bonds might be placed upon the road to complete it and build the bridge. The act also provided for the appointment by the governor of a fund commissioner for the company to receive all moneys belonging to the company, and to disburse the same as follows :

1. To said corporation the amounts required from day to day for the actual current expenditure in operating said railroad and carrying on the ordinary business of said corporation.

2. The amount of his salary as such fund commissioner in monthly installments.

3. The interest upon said first mortgage as the same should fall due.

4. The cost of construction and equipment of the said railroad.

5. The accruing dividends on preferred stock, not exceeding six per cent. per annum thereon, in accordance with the provisions of the act in relation thereto.

6. The interest due on the outstanding bonds of the State of Missouri, previously loaned to the company.

7. The payment of the principal of the first mortgage bonds, or, if none should have become due, then the payment of the principal of the bonds of the State ; and,

Lastly. The balance to be paid to the corporation.

The ordinance was adopted by the people in June, 1865, after the passage of the legislative enactment, and after its acceptance by the company. It is now claimed

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by the plaintiff that the act of February, 1865, was a contract between the State of Missouri and the North Missouri Railroad Company, and that the ordinance levying a tax on the gross receipts of the railroad company, was in direct violation of the contract, because the State's lien was postponed to the lien of the first mortgage authorized by that act, and it was expressly provided that the interest on the first mortgage bonds so created be paid to the fund commissioner, out of the earnings of the road, in the third class of disbursements, and the interest on the lien of the State in the sixth class of disbursements; that the ordinance requiring a tax of ten per cent. on the gross earnings to be paid to the State was in violation of the distribution of the earnings provided for by law, and an attempt on the part of the State to make itself a distributee in the first class.

It is readily admitted that the law of 1865 was a contract, and within the protection of the constitution of the United States, and that the State, after the acceptance of that law by the corporation, could not by an act, except the extinguishment of the mortgage thereby authorized, resume the position of first mortgagee. But is there anything in the act to prevent the State from exercising the sovereign power of taxation? The act does not pretend to grant exemption from taxation in express terms, and the courts will never presume or infer that the State intends to abandon or surrender the important right of taxation. Whatever restrictions may have been imposed by the adjudications of the national tribunals on the sovereign rights of the States to exercise this vital power of taxation untrammelled, in cases where the State had parted with the right for a valuable consideration, yet all the courts proclaim that the abandonment of the right can never be presumed; that the intention to abandon must appear in the most clear and unequivocal terms. Nor

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can there be any doubt of the power of the State, by reason of its sovereignty over the whole subject of taxation, to impose taxes on property previously exempt, or to raise the rates, unless there has been some express contract in limitation of the power upon a consideration deemed to be a part of the value of the grant or the charter. *Providence Bank v. Billings*, 4 *Pet.* 562; *Gordon v. Appeal Tax Court*, 3 *How.* 133; *Christ Church v. Philadelphia*, 24 *Id.* 300; *Philadelphia & Wilmington R. R. v. Maryland*, 10 *Id.* 376; *Jefferson Branch Bank v. Kelley*, 1 *Black*, 447; *Ohio Life Ins. & Trust Co. v. De Bolt*, 16 *How.* 417; *Washington University v. Rowse*, 42 *Mo.* 325; *St. Joseph v. Hann. & St. Jo. R. R.*, 39 *Id.* 476; *Lionberger v. Rowse*, 43 *Id.* 67; *City of St. Louis v. Boatmen's Ins. & Trust Co.*, 47 *Id.* 150; *Pacific R. R. v. Dulle*, 48 *Id.* 282. In the case of *City of St. Louis v. Boatmen's Ins. & Trust Co.*, *supra*, there was a clause in the charter which withdrew it from the operation of the general law relating to corporations, contained in the Revised Code of 1855, and it was thence contended that the corporation would not be liable to be taxed. But we decided that that provision simply guaranteed the charter against alteration and repeal, and in no wise granted an immunity from taxation. The act of incorporation was silent on the subject of taxation; and where that was the case, unless there was some contract to be impaired where there was a consideration given, it would never be presumed that the legislature had divested itself of the high attribute of sovereignty, the power to tax. The surrender of such an important prerogative was not to be deduced by implication.

In the present case I have failed to find anything whatever to show that the rate or manner of taxation of the corporation, its franchises or property, formed any part of the contract contained in the act of 1865. Nothing is said about taxation, and it does not seem

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to have entered into the contract between the parties, but was obviously left where the law had placed it before. No specific provision was made for the fund commissioner's paying the taxes, but he was authorized in the first class of disbursements to pay the current expenditures for carrying on the ordinary business of the corporation, and the payment of taxes would certainly fall within this class.

It is also argued that the tax is unequal, and is therefore opposed to the clause in the constitution which enjoins a uniform rule as to the imposition of taxes on all property. But it must be observed that the ordinance we are considering is a part of the constitution itself, expressly made so by its provisions on its adoption by the people. It is therefore a part of the fundamental law of the land. Of course, it must stand as well as any other part of the constitution, and cannot be nullified by the more general provisions of the same instrument concerning the powers of the legislature in reference to the general subject of taxation.

We have thus far assumed that the assessment provided for in the ordinance came within the scope and character of taxation. But the point is taken and advanced by the plaintiff that it is not a tax, that it amounts to a sequestration of property for the purpose of paying a debt, and has none of the criteria or elements of a tax. The question then arises, is the burden thus imposed by the people on these corporations a tax within the proper meaning of that term, as legally defined? "Taxation," says Chief Justice MARSHALL, "is said to be an absolute power which acknowledges no other limits than those expressly prescribed in the constitution, and, like sovereign power of every description, is trusted to the discretion of those who use it." *McCulloch v. Maryland*, 4 *Wheat.* 429. In the case of *Glasgow v. Rowse*, 43 *Mo.* 489, it was

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said, "taxes are burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes or to defray the necessary expenses in administering the government." A tax differs materially and essentially from a debt. The one is founded on contract; the other is not. A law which specifically appropriated the property of the citizen, and took it from one person and transferred it to another, would not be an exercise of the taxing power, no matter by what name it was called. To settle and fix the exact line of demarcation is a matter of great and perplexing difficulty; but mere oppressiveness in tax laws is no ground for setting them aside or arresting their operation. *Glasgow v. Rowse, supra.*

The power of the sovereign authority to tax is unlimited, and is a power to destroy. The only restraint is in the responsibility of those in whom the power is intrusted. Thus, in *People ex rel. Griffin v. Mayor of New York*, 4 *N. Y.* 419, 423, it was held that the two clauses of the constitution which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation, have no application to the taxing power. It was also decided in that case that the power to tax implies a power to apportion the tax as the legislature shall see fit, and that the power of apportionment has no limit where there is no constitutional restriction.

These views are affirmed in the case of *Brewster v. City of Syracuse*, 19 *N. Y.* 116, and also in the case of *Town of Guilford v. Board of Supervisors of Chenango County*, 13 *Id.* 143. It was held in the former of these cases that the legislature had the power to authorize the levy of a tax for the purpose of paying to one who had constructed a municipal improvement an addition to the contract price, which the corporation by its charter was forbidden to pay. The case of *Town of*

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Guilford v. Supervisors of Chenango County holds that the legislature have the power to levy a tax upon the taxable property of the town to meet a claim made against the town, although there is no legal obligation on the part of the town to pay such claim; and in a suit against the town it had been legally determined that the town was not liable to pay such claim. In the case of Thomas v. Leland, 24 Wend. 65, it was held that an act of the legislature imposing a tax upon a local district of the State in reference to a public improvement, is valid, notwithstanding that previous to the passage of the act a number of individuals of such district had entered into a bond to the State, by which they bound themselves to pay the whole expense of the improvement. These principles were reaffirmed in the case of Litchfield v. Vernon, 41 N. Y. 143, and in the case of People ex rel. Crowell v. Lawrence, *Id.* 137.

The settled principles to be deduced from these cases are that the sovereign power of taxation is lodged in the legislature; that the power of taxing and the power of appropriating taxation are identical and inseparable; that there is no constitutional restraint upon the exercise of its power; that the right of determining what portion of the public burdens, by way of taxation, shall be borne by any individual or class of individuals, must be determined by the legislature; that, however much this power may be abused by the legislature, the only check upon it is the responsibility of the legislative body to its constituents. Redress against unjust taxation must be sought in the same way, and no other, as redress against unjust and oppressive legislation in the general enactment of laws is sought.

The judicial department of the government furnishes no redress in such cases. There is no power in the judiciary to remedy injustice and oppression in a legislative act, except where in the attempted injustice or

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oppression some constitutional provision is violated. It was so decided by this court in *Hamilton v. St. Louis County Court*, 15 Mo. 3, where GAMBLE, J., said: "It is a principle, in construing the constitution, that the mere fact that a law is unjust in its operation, or even in the principles upon which it was adopted, does not authorize any expansion of the prohibitions in the constitution beyond their natural and original meaning, in order to remedy the evil in the particular case." This is the admitted construction in cases of legislative enactments, and when it comes to passing upon the organic law, the courts have no power to construe away its natural meaning, or grant relief on the supposed ground that it is founded on a wrong principle or commits an injustice. The New York cases are adjudications upon tax laws where the legislature was not restricted in its action over the subject by any constitutional limitations. But here the tax is levied by the constitution itself, where in the very nature of things there would be no limitation or restriction over the body making the law and ordering the levy. There is nothing objectionable that we can see in taxing the gross receipts of the corporation. They are a usual and ordinary subject of taxation, and they were selected as a species of property in this instance by the sovereign power, and we have no right to say that the selection was wrong.

It is further argued that the money raised is not raised as a tax, because it was not levied or obtained for purposes of revenue. But this argument, it seems to us, is fallacious. The tax was levied and raised for the purpose of paying the interest and principal on a part of the State's indebtedness. How else does the State pay off her indebtedness except by money raised by taxation? When money is once raised by taxation it is revenue, without regard to the question as to what specific purpose it is appropriated or applied. It is

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usual and customary to levy a certain rate of taxes for special purposes, as, for instance, a certain amount to pay off interest, or to support and maintain schools, &c. The ordinance says that the tax collected and assessed shall be applied to the payment of certain obligations for which the State is bound. This is the only way in which the State can discharge her indebtedness by the collection of taxes, and it is one of the very objects for which taxation is resorted to. The fact that it is levied on the parties primarily liable does not render it invalid, provided there was no constitutional barrier in the way prohibiting the discrimination.

It is admitted by the agreed case that the bonds of the corporation are outstanding and have never been paid. But the agreed case nowhere finds that the ten per cent. tax levied upon the gross earnings of the road decreased the fund to such an extent as to endanger the prompt payment of interest on the preferred bonds in any manner, or to shut out any of the distributees prior in order to the claims of the State for interest. I cannot, therefore, see that the ordinance is obnoxious to the charge of impairing the obligation of a contract, and I think also that it provides for nothing more than the legitimate exercise of the power of taxation. The question whether there was any informality in the matter of making the assessment need not be discussed. If the ordinance was valid the assessor had jurisdiction, and in such a case the collector cannot be held responsible for any informal or irregular proceeding of the assessor.

It follows, therefore, that the judgment of the circuit court must be reversed.

BLISS, J., concurred.

ADAMS, J., was not a member of this court when the case was argued.

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7 Kansas, 479.

Municipal aid to railroads—Legislative power to authorize—Question of law. The question whether the legislature possesses the power to authorize counties to grant aid to railroad companies by subscribing for stock therein, and issuing bonds in payment therefor, when it comes to the courts is purely a legal question, and the courts have nothing to do with the wisdom or policy of such legislation.

Legislative power—Its source and extent; Powers of the people. The legislature have no inherent power, but all their power is derived from the people through the constitution of the State. The people, in their primary capacity, possess all the political power of the State, and may themselves authorize counties to grant aid to railroad companies; or they may, if they choose, delegate this power to the legislature, and allow the legislature to grant such authority to counties.

Limitation. The legislature cannot exercise any power retained by the people, or not delegated by the people to the legislature.

General Laws—Uniform operation throughout the State. Where the provisions of an act are designed for the whole State, and every part thereof, such act has, in contemplation of section 17, article 2, of the constitution, a uniform operation throughout the State, notwithstanding the condition or circumstances of the State may be such as not to give the act any actual or practical operation in every part thereof.

Internal improvements; Constitutional inhibition construed. Section 8, article 11, of the constitution, which prohibits the State from ever being a party in carrying on any works of internal improvement, applies to the State in its sovereign corporate capacity, and not to the subordinate political subdivisions thereof. It prohibits the State as a State, and not counties, from being parties in carrying on any works of internal improvement.

Counties; Stockholders in railroad corporations. There is no express provision of the constitution which prohibits the legislature from authorizing counties to become stockholders in railroad companies, and issuing their bonds in payment for such stock.

Aid to railroads—Validity of statutes, and bonds. Chapter 12 of the Laws of 1865, and other acts passed by the legislature of the State of Kansas authorizing counties and cities to subscribe for

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stock in railroad companies, and issue bonds in payment of the stock so subscribed for, are constitutional and valid.

Statutes; Constitutionality; Presumption. All presumptions are in favor of the constitutional validity of a statute, and before the courts can declare it invalid, it must clearly appear to be unconstitutional.

General legislative power—Grant of, where found. The power of the legislature to pass an act granting municipal aid to railroad companies must be found in the general grant of legislative power under section 1, article 2, of the constitution, which provides that the legislative power of the State shall be vested in the legislature, or not at all.

The term "legislative power" includes the power to authorize municipal aid to railroad corporations. At the time the constitution was framed, the term "legislative power" had a definite and precise signification with reference to this question, established by legislative, executive, and judicial construction, practice and usage, and the general understanding of the people throughout the United States, which general understanding and signification was, that said term included the power to authorize municipal aid to railroad corporations; and therefore, in the absence of anything to the contrary, it must be presumed that the people of this State, when they framed their constitution, used said term with the signification generally given to it, and therefore that they intended to give to the legislature the power to pass acts authorizing municipal aid to railroad companies.

Courts must construe, not amend, the Constitution. If it was the intention of the people that the constitution should give to the legislature the power to pass acts authorizing municipal aid to railroads, that instrument must be so construed by the courts; and the courts have no power to amend it, or change any of its provisions, or insert any new provisions in it, through the means of judicial construction or interpretation.

Aid to railroad corporations—For what purposes given. The aid given to a railroad company is not strictly for a private purpose, nor wholly for a public purpose, though the object intended by the legislature is a public purpose.

Public purposes, how accomplished; ultimate object and how determined. The government may accomplish a public purpose through the means of a private agency, a private individual or individuals, or a private corporation. It is the ultimate object to be obtained which must determine whether a thing is a public or a private purpose. The ultimate object of the government in grant-

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ing municipal aid to railroads, is to increase the facilities for travel and transportation from one part of the country to the other, which object is in its nature a public purpose.

Taxation, for what purposes. Taxation is the most universal power possessed by governments, being an incident and auxiliary of every other power, and may be resorted to whenever it is necessary to accomplish a public purpose, or to carry out any other power granted to the legislature.

Railroads, authorized and constructed for public, and not for private purposes. If a railroad is made absolutely free for every one who chooses to ride and transport goods upon it, it is to be deemed and held as constructed for a public purpose, notwithstanding the government may allow a (in other respects) private corporation to own and operate it, and to receive a compensation therefor, provided it is a road for which the government exercises the right of eminent domain, and retains the right to limit or restrict the compensation for freight and fare.

Municipal aid—Extent of, rule for determining. The localities along the line of a railroad may be taxed to aid its construction and operation, if they choose to take stock therein and issue bonds thereto; and a fair rule of apportionment, of which the taxpayers cannot complain, is, to allow the localities to be taxed the privilege of saying how much the benefit of the improvements is worth to them, and for what amount they are willing to be taxed.

Error from Leavenworth district court.

Chapter 12 of the Laws of 1865, entitled "An act to authorize counties and cities to issue bonds to railroad companies," was approved February 10, and took effect February 14, 1865. Section 1 of said chapter provided "That the board of county commissioners of any county, to, into, through, from, or near which, whether in this or any other State, any railroad is or may be located, may subscribe to the capital stock of any such railroad corporation, in the name and for the benefit of said county, not exceeding in amount the sum of three hundred thousand dollars in any one corporation, and may issue the bonds of such county, in amounts as they may deem best, in payment for said stock. . . . But no such bonds shall be issued until

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the question shall be first submitted to a vote of the qualified electors of the county at some general election, or some special election," &c. *Laws of 1865*, 41. The board of commissioners of Leavenworth county called a special election to be held June 30, 1865, to determine by vote of the qualified electors of said county whether said board of county commissioners should subscribe two hundred and fifty thousand dollars to the capital stock of the "Union Pacific Railway Company, Eastern Division," and issue the bonds of the county in payment for said stock. The notice of the election stated the question submitted to the electors to be, "whether the commissioners should issue two hundred and fifty thousand dollars in bonds *to be expended in the stock* of said railway company." The proposition having received a majority of all the votes cast at said special election, the county commissioners, on August 1, 1865, made the subscription and issued the bonds. Series "A" of the bonds so issued fell due in March, 1867. One of these bonds, of the denomination of two hundred and fifty dollars, was assigned to Edward Miller, defendant in error, who presented it, after maturity, to the treasurer of Leavenworth county, and demanded payment, which was refused. The county board had, at an earlier period, made an order directing the treasurer not to pay any of said bonds. Miller brought suit against the board of county commissioners of the county of Leavenworth to recover the principal and interest due on his said bond. The case was tried at the November term, 1868, of the district court, when the plaintiff had judgment for two hundred and eighty-eight dollars and eighty cents. From this judgment the board of county commissioners appeal, and they bring the case to this court by petition in error, the principal objection urged being, that said chapter 12 of the *Laws of 1865* is unconstitutional and void, and

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that said bonds were therefore issued without authority of law, and are void.

Thomas P. Fenlon, for plaintiffs in error.—1. It will not be contended that outside of the provisions of chapter 12, Laws of 1865, the county commissioners had any power or authority whatever to subscribe to the capital stock of the Union Pacific Railway Company, or to issue bonds in aid of such enterprise. Such acts would be beyond the usual and ordinary powers of such a tribunal. If said chapter 12 is valid, the board had no authority until the question was submitted to the electors of the county, whether they, the commissioners, should, "*in the name and for the benefit of the county*," subscribe to the capital stock of the Union Pacific Railway Company, Eastern Division. Was this question submitted to the electors of Leavenworth county? The record does not show such to be the fact. There was a question submitted, and that question was, "whether the commissioners should issue two hundred and fifty thousand dollars in bonds, *to be expended* in the stock of the said railway company." The law did not authorize the submission of this question. The people could only authorize the commissioners to "*subscribe* to the capital stock," and that question was not submitted, and bonds issued without authority are void. Commissioners of Shawnee County v. Carter, 2 *Kas.* 115.

It is a general rule that, when special ministerial authority is conferred by statute, it shall be strictly observed. 12 *Iowa*, 153; 13 *Ohio St.* 311; 23 *N. Y.* 440; 22 *Ind.* 88, 509; 38 *Ill.* 45.

2. But said chapter 12 of the Laws of 1865 is unconstitutional and void. It purports to authorize subscriptions and bonds in aid of private corporations. We deny the right in any event, under the constitution of Kansas, to subscribe to the capital stock of the railway

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company, and pay for the same by taxation. Taxation is a mode of raising revenues for public purposes only; a tax must be imposed for a public and not a mere private purpose. 19 *Wis.* 624; 57 *Pa. St.* 438; 21 *Id.* 168. Is money raised by taxation, which is to be paid over, when collected, to the Kansas Pacific Railway Company, devoted to a public, and not a private purpose? Is said railway company a public or private corporation?

"The main distinction between public and private corporations is, that over the former the legislature, as trustee or guardian of the public interests, has the exclusive and unrestrained control. . . . Private corporations are created by an act of the legislature, which, in connection with its acceptance, is regarded as a compact, and one which, so long as the body corporate faithfully observes it, the legislature is constitutionally restrained from impairing." *Ang. & A. on Corp.* 22, 23.

Railroads are private corporations. *Gen. Stat.*, ch. 23, p. 199, § 5; p. 201, art. 6; 29 *Ala.* 221; 1 *Baldw.* 205; 3 *Har.* 200.

Section 8, article 11, of the constitution of this State, provides that "The State shall never be a party in carrying on any works of internal improvement;" that is, the entire people of the commonwealth, *en masse*, shall not be concerned in any work of internal improvement. How, then, can any portion of said people be invested with a power denied the entire community? Can a part be greater than the whole? If counties can do what the State is forbidden to do in this respect, may they not, by the same species of logic and construction, be authorized to exercise every other power denied to the State? 18 *Wend.* 70; 10 *Wis.* 257; 21 *Pa. St.* 181; 10 *Wheat.* 50; 1 *Ohio St.* 94, 97, 101.

It is claimed that the weight of authority is favorable to such legislation as our act, chapter 12 of the

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Laws of 1865. But many if not most of the cases quoted as authority, are decided in States the constitutions of which have no such prohibitory clause as ours has; and we submit the reasoning of the Iowa, Wisconsin and Michigan cases against the validity of such legislation has never been successfully answered.

Judge REDFIELD says (*Red. on R.* § 230, note): "For ourselves we are free to confess that we never could comprehend the basis upon which so many able jurists in this country have professed to perceive clearly the reasons for giving municipal corporations the power to become stockholders in railway companies. We have always felt it was one of those cases in jurisprudence where the wish was father to the thought." And Judge DILLON, *Circ. Ct. U. S.*, in a review of *Whiting v. Sheboygan Railway Co.*, 25 *Wis.* 167, says, "the obvious tendency of the judicial mind" is against the power claimed; and Judge COOLEY, in the late case in Michigan, *People ex rel. Detroit & Howard R. R. Co. v. Township Board of Salem*, says: "The best judgment of the legal profession has always been against the lawfulness of this species of railroad aid, and there has been a steady and persistent protest, which no popular clamor could silence, against the decisions which supported it." 20 *Mich.* 452.

E. Stillings and *T. A. Hurd*, for defendant in error—

1. All the proceedings on the part of the commissioners of Leavenworth county in submitting the question to the electors, and making such subscription and issuing, and delivering said bonds, were in compliance with the statute, chapter 12, 1865, p. 41. The notice for the election was sufficient, and in full compliance with the statute. A mere irregularity in the election, or in the notice therefor, that does not deprive any voter of his franchise, does not avoid the election, and will not vitiate or affect the bonds issued under the authority of

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such election. 9 *N. Y.* 67; 15 *Ind.* 395; 29 *Ill.* 54, 406, 414; 10 *Iowa*, 161; 2 *Redf. on R.* 398, 299, 401, 403.

2. But the real question in this case is, whether the act of 1865 (chapter 12), authorizing counties to subscribe for stock and issue bonds in payment of such subscriptions, in aid of railway corporations, is constitutional and valid.

We understand this question has been repeatedly adjudicated in this court, and the power of the legislature to pass the law under which the bond in suit was issued, affirmed. 2 *Kas.* 454; 3 *Id.* 104. And in the case of *State ex rel. Meier v. McCrillus*, 4 *Kas.* 250, which was an alternative mandamus issued by this court to compel the payment of bonds of the same series and issue of the bond in suit in this case, the court conceded the validity of the bonds, but based its decision upon another point in the case.

Article 2, sections 1, 21, and article 12, section 5, of the constitution, are a sufficient warrant and authority to the legislature to pass the act in question, unless the power therein granted is limited or revoked by article 11. We contend that article 11 was intended as a limitation of power in relation to the State and its affairs, and has no application to the municipal corporations which the legislature is authorized to create, and that there is not in that article anything which in any way attempts to limit legislation in relation to municipal corporations.

All that the law in question attempts is, to provide a way in which the people of a county or city may decide for themselves whether they, in their corporate capacity, will become stockholders in these *quasi* public corporations, and will tax themselves to pay debts contracted in carrying out the purposes of such enterprises.

The State at large is not affected, except incidentally and beneficially; nor is the State or the people of the

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State at large in any manner called upon to contribute to the payment of such debt.

At the time the constitution of Kansas was framed and ratified, the courts of every State, with one exception (Iowa), in which the question had been litigated, had decided in favor of the validity of such laws as that in question; and now the decisions of the highest courts of a majority of all the States stand in favor of and sustaining the validity of such laws, while two only (Iowa and Michigan) are recorded against them. Is it not fair to presume that our constitution was framed in view of these judicial decisions, and that the people, in adopting it, adopted the construction which had been given to similar constitutions and statutes elsewhere?

BY THE COURT.—VALENTINE, J.—This action was commenced by the defendant in error, in the court below, to recover from the county of Leavenworth a sum of money claimed to be due upon a certain bond of said county. This bond is for the sum of two hundred and fifty dollars, and is one of a series of bonds amounting in the aggregate to the sum of two hundred and fifty thousand dollars, issued by said county to the Union Pacific Railway Company, E. D., in payment for a like amount of the capital stock of said company. This bond was issued August 1, 1865, under an act of the legislature authorizing counties to subscribe to the capital stock of railroad companies, and to issue bonds in payment therefor, approved February 10, 1855. *Laws of 1865*, 41. And the principal question in this case is, whether the legislature had the constitutional authority to pass said act.

This case was submitted to this court with but very little argument concerning the constitutionality of said act; but since its submission two other cases (State

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ex rel. St. Joseph & Denver R. R. Co. v. Commissioners of Nemaha County; and Morris v. Commissioners of Morris county), involving the same question, have been submitted to us, in which able and exhaustive arguments have been made by able counsel on both sides. We shall, therefore, not only consider the points made by counsel in this case, but will also consider the points made by counsel in the other two cases, so far as they have any application to this case. In the first of said cases, which is an application for a writ of mandamus, we shall in connection with this case deliver an opinion and allow an alternative writ of mandamus to issue. In that case, as in this, we affirm the constitutionality of said act, but in that case we shall leave all other questions to be decided upon the return of the alternative writ.

This is beyond all comparison the most important question ever brought before this court for decision. While it is true that the amount involved in this particular controversy is comparatively small, yet the decision in its ultimate consequences involves millions of dollars. Fabulous amounts of county and municipal bonds have already been issued and thrown upon the market with a profusion and prodigality bordering on recklessness and culpable extravagance, "and the end is not yet." And this decision in its ultimate consequences determines the validity or invalidity of all these bonds. But our duty is plain. The question presented to us for our consideration is purely a legal question. We have nothing to do with the wisdom or the policy of issuing such vast amounts of county and municipal bonds. That belongs to the legislature, and the people who vote to issue them. We simply determine whether the legislature had the *power* to authorize their issue; and not whether they acted wisely or unwisely in exercising such power. We are not the guardians of the legislature in this respect, nor of the

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people who vote to issue bonds ; nor are we responsible for their acts, whatever may be the consequence.

We suppose that it will be conceded by every one that the legislature have no *inherent* power of any kind ; that they possess no power except such as is delegated to them by the people ; and that unless the constitution of the State authorizes them to enact such a law as the one under consideration, they had no authority to do so. On the other hand, we suppose it will be conceded that the people are the original source and fountain of all civil and political power ; that in their primary capacity they are supreme ; that they had ample authority to exercise all of this power themselves, or, if they so chose, to delegate the same exclusively to the legislature. In short, we suppose it will be conceded that the people had full power and authority to delegate to the legislature all power necessary to pass said acts. The question then, is, not whether the people had the power to authorize the legislature to pass said act, for that must be conceded ; but it is, whether the people actually did so authorize the legislature to pass such acts. The counsel who claim that said act is unconstitutional, have seen fit to call our attention to certain sections of the constitution with which (and with these only, as we understand) they claim that the act is in direct contravention. We shall therefore first examine said sections before we proceed to examine the main question in this case, which is whether the people have, through the constitution, granted sufficient power to the legislature to pass said act. The sections of the constitution which are supposed to prohibit this species of legislation, are as follows : *Bill of Rights*, § 20 : "This enumeration of rights shall not be construed to impair or deny others retained by the people ; and all powers not herein delegated remain with the people." Art. 2, § 17 : "All laws of a general nature shall have a uniform operation throughout the State." Art. 11,

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§ 8: "The State shall never be a party in carrying on any works of internal improvement."

We have no provision in our constitution, as there is in the constitutions of most of the States, requiring that private property shall not be taken except by "due process of law," or by "due course of law," or by the "law of the land," or "for public use without just compensation." The nearest that anything in our constitution comes to it as follows: *Bill of Rights*, § 18: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Art. 12, § 4: "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

We do not suppose that these omissions from our constitution affect in the least any question involved in this case; but their omission explains the reason why counsel for plaintiffs in error have failed to make any point on them. See *Sedgw. on Stat. and Const. Law*, 1 ed. 501, *et seq.* We can see no possible application that can be made in this case of section 20, Bill of Rights. It will be admitted that without that section the legislature cannot exercise any power retained by the people or not delegated by the people to the legislature, and that is all that can be claimed with the section. And it is impossible for us to see that said section in any way enlarges the power of the court to nullify acts of the legislature.

We scarcely think it necessary to say anything with reference to section 17, article 2 of the constitution. The act under consideration is so obviously in harmony with this section, that the question attempted to be raised upon its supposed incongruity needs no elucidation from us. All the provisions of said act are expressly enacted for the whole State, and for every part of the State;

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and it is no more necessary that the same amount of stock be taken in each and every county of the State, in order that the act shall have a uniform operation therein, than that the same number of men shall be executed in each county of the State, in order that the law punishing murder in the first degree shall have a uniform operation throughout the State. Scarcely any of our laws have had any actual or practical operation out in the buffalo region, and yet it will hardly be contended that they are unconstitutional for that reason.

It is contended by counsel for plaintiff in error, that as by section 8 of article 11 of the constitution the State is prohibited from ever being a party in carrying on any works of internal improvement, each subordinate political subdivision of the State, such as counties, cities, towns, &c., must also necessarily be so prohibited. This construction of said section we think is erroneous, and arises from a misconception of the meaning of the word "State" as used in this connection. We think the word "State" as here used means the people of the State as a sovereign corporation, and not the people of the State considered as individuals or minor and subordinate corporations. That it does not mean property or territory of the State, all will admit; for such inanimate objects could not be *a party in carrying on* any work of internal improvement, or in carrying on anything else; and that it does not mean the people considered as individuals, or subordinate corporations, we think we can show. If it be claimed that said word means The State, in all its parts, it will lead to inextricable difficulties, and prove entirely too much. The people as individuals are the original elements out of which the State is composed, and each individual is as much a part of the State, as any corporation, public or private. And we suppose it will hardly be contended that the people of the State, as individuals, could not engage in any work of internal improvement. But a distinction

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may be made between the people as individuals, and as organized into corporations. The people as individuals do not obtain their power from the State; their power is original and inherent, while the power of corporations is obtained entirely from the State, and is purely derivative and delegated. But whenever this distinction is resorted to, it is a virtual abandonment of the claim that the State is prohibited *in all its parts* from engaging in works of internal improvement, and it is setting up another claim, that the State is thus prohibited only in such of its parts as it itself creates. And this claim is equally untenable. A private corporation is wholly created by the State, as much so as a public corporation. It has no inherent power, and does not exist of itself. It is an artificial being, invisible, intangible, and exists only in contemplation of law. It is the mere creature and the creation of the State in which it exists, and has no power of its own. And cannot a private corporation engage in works of internal improvement? Nobody will say that it cannot; and hence this claim must also be abandoned. But it may be claimed that there is a distinction between public and private corporations; that public corporations are created solely for governmental and public purposes, and that private corporations are created merely for private purposes; and that while the State may effect purposes through the agency of private corporations which it could not effect directly through its own agency, yet that it cannot effect any object through the agency of a public corporation which it could not effect directly through its own agency; that it can perform just such acts and no more through the agency of public corporations, as it could perform directly through its own agency. The argument drawn from this distinction is equally as fallacious as the others. The State as a State is absolutely prohibited from engaging in any works of inter-

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nal improvement. We will concede that this prohibition does not extend to the building of a state-house, penitentiary, state university, and such other public improvements as are used exclusively by and for the State, as a sovereign corporation; but it does extend to every other species of public improvement. It certainly extends to the construction of every species of public improvement which is used, or may be used by the public generally—by any and every private individual who may choose to use it, such as public roads, bridges, &c. *Mayor, &c., of Wetumpka v. Winter, 29 Ala. 660.* Now, notwithstanding this prohibition upon the State, notwithstanding that it is prohibited from opening up or constructing any roads, highways, bridges, ferries, streets, sidewalks, pavements, wharfs, levees, drains, water-works, gas works, or the like, yet we find it authorizing public corporations to do so. And although it is prohibited from exercising the sovereign power of eminent domain in its own favor in opening up and constructing roads, highways, bridges, ferries, &c., yet we nevertheless find it exercising said sovereign power in favor of public corporations. Even a private corporation or individual cannot construct or operate a railroad over the land of another without the owner's consent, unless the State first so far becomes a party in carrying on such improvement as to authorize such private corporation or individual to take said land under the sovereign power of eminent domain. Hence we find that those who claim that the prohibition upon the State is also a prohibition upon all the public corporations of the State, are driven from every position they may assume. If they claim that it is a prohibition upon the State in all its parts, then they prohibit individuals from constructing internal improvements. If they claim that it is a prohibition upon such of its parts only as are created by the State itself—artificial persons—corporations—then they prohibit

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private corporations. And if they claim that the prohibition applies to public corporations and to them only, then they prohibit counties, townships, and road districts, from constructing roads, bridges, &c.; and cities, towns, and villages, from constructing streets, sidewalks, drains, &c. But the end is not yet; there are still further and perhaps greater difficulties in the way.

Sections 5 and 6 of the same article which prohibits the State from ever becoming a party to any works of internal improvement, provide that the State shall not contract debts to exceed one million of dollars, unless the same be authorized by a direct vote of the people. Will it be contended that this prohibition embraces within its scope and operation, the subordinate political subdivisions of the State, as well as the State in its sovereign corporate capacity? It has never been so understood. The State has already gone to the full limit of one million of dollars in contracting public debts. Leavenworth county has probably gone as far. Many other counties and cities have also contracted large amounts of public debts, and if counties, townships, school districts, road districts, cities, towns, and villages, are all embraced within this prohibition—if the public debt of the State, including all its subdivisions, cannot, in the aggregate, exceed one million of dollars, then a vast amount and number of illegal debts, have already been created in Kansas, and the whole people of the State have been continually and ruthlessly violating their own constitution in this regard. But if this prohibition, with regard to contracting public debts, is not an interdiction upon the political subdivisions of the State, how can it be said that the other prohibition is? Of course we recognize the maxim, *qui facit per alium, facit per se*, as embodying a sound principle of law; but it can have no possible application to the question now under consid-

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eration. It is true that no county or municipal corporation can construct or operate a railroad except by the authority of the State ; but it is equally true, as we have already seen, that no private corporation or private individual can construct or operate a railroad over lands belonging to another without the owner's consent, except through the intervention and by the authority of the State ; and no railroad has ever been constructed in this State except by positive authority given by the State. Now, if it be claimed that the State, by authorizing a county or municipal corporation to become a party in the construction or operation of a railroad, thereby becomes a party to the same itself, then it must necessarily follow that the State, by authorizing a private corporation or private individual to become a party in the construction or operation of a railroad, must also necessarily thereby become a party itself in the construction and operation of such railroad. It is true, that in one sense the State becomes a party in the construction and operation of a railroad whenever it authorizes the same to be built, but not in the sense contemplated by the prohibition in the constitution. It was not the intention of the framers of the constitution to entirely exclude internal improvements from the State. It was not their intention to entirely prohibit the construction of the same. But it was only to prohibit the State *as a State* from being a party thereto. It left the State as free to authorize others (that is, to authorize public or private corporations or individuals), to construct internal improvements, as though the prohibition had never been placed in the constitution. Several other States have provisions in their constitutions similar to the one we are now considering, and several courts have already construed such provisions. The decisions are uniform, with the exception of one decision in Iowa (*State v. Wapello Co.*, 13 *Iowa*, 388), which decision has never since been

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followed in Iowa or elsewhere—all sustaining the construction that we have given to said provision. See *Cass v. Dillon*, 2 *Ohio St.* 607, 612 to 616; *Pattison v. Board*. Sup. Yuba Co., 13 *Cal.* 175, 182; *Clarke v. City of Janesville*, 10 *Wis.* 136, 170; *Bushnell v. Beloit*, 10 *Id.*, 195, 221; *Slack v. R. R. Co.*, 13 *B. Monr.* 1; *Dubuque v. R. R. Co.*, 4 *Greene (Iowa)*, 1, 3; *Clapp v. Cedar Co.*, 5 *Id.* 15; *Steward v. Sup. Polk Co.*, 30 *Id.* 9; *Prettyman v. Supervisors, &c.*, 19 *Ill.* 406, 411; *Robertson v. Rockford*, 21 *Id.* 451, 457; *City of Aurora v. West*, 9 *Ind.* 77 to 79; *Police Jury v. McDonough*, 8 *La. Ann.* 341; *New Orleans v. Graible*, 9 *Id.* 561; *Cooley Const. Lim.* 216 to 219.

In closing this branch of the case we would say that the constitution means just what it says. It says the *State* shall never be a party in carrying on any work of internal improvement, and it means the *State* and not *Leavenworth county*; and to hold that this restriction upon the State is also a restriction upon counties, cities, &c., is to put words in the constitution which its framers omitted, and to overturn a well-settled rule of constitutional and statutory construction: *Expressio unius est exclusio alterius*.

On the side of the defendant in error, we have been referred to the following sections of our constitution.

Art. 2, § 21. "The legislature may confer upon tribunals transacting the county business of the several counties such powers of local legislation and administration as it shall deem expedient." *

Art. 12, § 5. "Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessment, borrowing

[* The words, "and administration," are omitted from this section of the constitution in *Gen. Stat.* 1868, p. 45. They are found in the section as printed in *Gen. Laws*, 1860, p. 53, and *Comp. Laws*, 1862, p. 56.—REPORTER.]

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money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power."

We do not suppose that these sections can in any way affect the decision of this case. No legislative power was exercised by the people or the county commissioners of Leavenworth county. *L. M. & B. R. Co. v. Geiger*, 34 *Ind.*, 220; *C. W. & Y. R. v. Commissioners of Clinton Co.*, 1 *Ohio St.* 77; *Cooley Const. Lim.* 117 to 119, and authorities cited. And section 5, article 12, referred to, does not authorize *counties* to contract debts, loan their credit, &c., in carrying on any works of internal improvement.

II. Having disposed of all the preliminary questions raised in this case, which were probably thrown in only as make-weights, and finding that there is no express provision of the constitution with which the said act is in contravention, we come now to the main question in the case, which is, whether the constitution of the State authorizes the legislature to pass such an act as the one under which the bond in controversy was issued. All there is of importance in this case is involved in this question. The question of whether an act of the legislature is constitutional or not, is now really before us.

The mere passage of the act is some evidence of its constitutional validity, for the legislature could not have passed or the governor have approved the same, without impliedly, at least, declaring that the same was constitutional and valid. And this, both the legislature and the governor have done, after taking a solemn oath to support the constitution. We shall not claim, however, that this is the strongest kind of evidence in favor of the constitutionality of the act, for neither the executive nor the legislature are elected with special reference to their ability to expound the laws or the constitution. But with this in its favor, and looking only to this, we should not declare the act unconstitu-

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tional unless the reasons against its constitutionality at least preponderate over the reasons in favor of its validity. If the reasons are equally balanced we should certainly declare in favor of its validity. The rule governing courts in this respect is usually expressed in much stronger terms. It is generally said (and this is probably the true rule) that before an act of the legislature can be declared unconstitutional, its unconstitutionality must clearly appear. State *ex rel.* Crawford v. Robinson, 1 *Kas.* 18, 27; Atchison v. Bartholow, 4 *Id.* 124, 141. But some courts have gone further, and said that its unconstitutionality must clearly appear beyond all reasonable doubt. Sears v. Cottrell, per CHRISTIANOY, J., 5 *Mich.* 257, 261; Twitchell v. Blodgett, per COOLEY, J., 13 *Id.* 162; People v. Mahoney, per COOLEY, J., *Id.* 501; *Cooley Const. Lim.* 182, and cases there cited.)

Judge COOLEY says, in his work on Constitutional Limitations, that: "The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it (the legislative power) must be considered as *practically absolute*, whether it operate according to natural justice or not." . . . "Any legislative act which does not encroach upon the other departments of the government, being *prima facie* valid, must be enforced, *unless restrictions upon the legislative power can be pointed out in the constitution, and the case shown to come within them.*" Page 168. "Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words." Page 171. But if we should adopt the stronger rule laid down by courts, it would virtually cut off all further inquiry into the constitutionality of said act; for this court would hardly assume to declare, in the face of twenty-five or twenty-six legislatures that have enacted

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similar statutes, and twenty-five or twenty-six executives that have approved the same, and twenty-five or twenty-six supreme courts—State and federal—that have declared such statutes to be constitutional, that this act is clearly unconstitutional beyond all reasonable doubt, or even, that it is clearly unconstitutional.

But with reference to this particular statute the strongest rule in favor of its constitutionality should be adopted. All presumptions are in favor of its validity. It was not passed through the hurry and bustle of hasty legislation; nor through inadvertence or oversight; nor through whim or capricious fancy, nor through the influences of party drill or party machinery; nor through chicanery, fraud or corruption; but it was passed after due deliberation and discussion. Besides, it is not an isolated statute, standing alone in questionable solitude upon the statute books of Kansas. Two-thirds of the legislatures of the Union have passed similar statutes, and two-thirds of the highest judicial tribunals of this country have declared them to be constitutional. And further, this statute in substance, though in some respects modified, still remains upon our statute book, although it has passed the scrutiny of six subsequent legislatures since its first adoption. It has, of course, been declared and repeatedly declared constitutional by the legislative and the executive branches of the State government, for it has repeatedly obtained their sanction and approval. This, to begin with, is certainly very strong evidence in favor of its constitutional validity. It will be conceded that the constitution does not anywhere in definite and precise terms authorize the passage of said act, and it will be conceded that unless such authority is given by section 1, article 2, of the constitution it is not given at all. Said section reads as follows: "Sec. 1. The legislative power of the State shall be vested in a house

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of representatives and senate." The question then resolves itself into this: Was the passage of said act the exercise of legislative power? If it was, the act is of course constitutional; but if not, then the act is certainly unconstitutional. It is claimed that the passage of the act was not the exercise of legislative power, and therefore that the legislature transcended their authority in passing the same, and that the act is void. It is not claimed, as we understand, that the legislature invaded the province of one of the other departments of the government, but that it usurped power which had not been delegated to any of the departments, but was retained by the people. As the people have by the constitution clothed the legislature with all the legislative power of the State, the first great question is, what is "legislative power?" This may be answered by saying that it is the power to make the laws. But then the question, equally difficult, arises, what is a law? This may be answered by saying that it is a rule of civil conduct prescribed by the supreme power of a State, which, under the constitution, and for that purpose, is the legislature; and still we are left as much in the dark as we were before. Some things we know come within the scope of legislative power. Other things we know do not. But we have no rule by which we can always determine accurately and precisely whether a given thing comes within the scope of legislative power or not. Hence the difference of opinion we find among eminent jurists. We shall not attempt to give a definition of these words, nor prescribe a rule whereby it may be determined in all cases what falls within and what falls without the scope of legislative jurisdiction; but our inquiry shall be devoted entirely to ascertaining whether the authority granted to counties, and municipal corporations, to aid railroad companies by way of subscription to the capital stock thereof, and to issue bonds in payment there-

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for, falls within or without the scope of legislative authority.

That the people of the State had the authority to delegate to the legislature all the power that the legislature attempted to exercise in the passage of said act, we have already assumed as conceded. Hence, without being embarrassed by the discussion of any collateral questions, we shall proceed at once to the consideration of what we consider the main question in the case—the meaning of the words “legislative power,” or rather, what did the people understand those words to mean when they framed the constitution; for upon such meaning depends the whole question in controversy in this case. That words have no positive or absolute signification in and of themselves—no inherent meaning—is a proposition too well understood by educated men to need exemplification or citation of authority. That they are only conventional signs adopted by common consent and common usage to express certain ideas, and mean just what the people using them choose by common consent to make them mean, is too well settled to be disputed. And that they must always be presumed to mean, in the absence of anything to the contrary, just what they were generally understood to mean when they were used, is too near axiomatic to be controverted. “The popular or received import of words furnishes the general rule for the interpretation of public laws as well as private and social transactions.” *Maillard v. Lawrence*, 16 *How. U. S.* 251, 261; *Wetumpka v. Winter*, 29 *Ala.* 651, 660. And who could indulge the extravagant supposition that the framers of a constitution for the people of a young and growing commonwealth having vast possibilities before it, should use language in a sense never before so used, and in such a sense as must necessarily mislead the very people for whom it is framed, and upon whom devolves the duty and neces-

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sity of its correct interpretation? Nothing has been shown or can be shown that will tend in the least to prove that the words we are now considering were used in any different sense or were intended to have any different signification from that ordinarily given to them. The question, then, is narrowed down simply to this: What were these words generally understood to mean at the time the constitution was framed? That they had a general signification with reference to the question now under consideration cannot be questioned; for about two-thirds of the States, as well as the United States, and the then Territory of Kansas, had already given to them a construction. The constitution of Kansas was framed in 1859, and the State was admitted into the Union under it in 1861 (January 29). At this time, the meaning of these words, and the general scope and authority of legislative power with reference to this question, had become well settled by legislative, executive, and judicial construction, practice, and usage. And while no room is left to doubt that these words had a general signification, no room is left to doubt what that signification was. All the decisions of the courts were one way, and in favor of the power of granting municipal aid to railroad companies, and not a solitary decision was at that time the other way.

As early as 1837 the question was settled, or at least decided by a court of last resort in Virginia: *Goodin v. Crumps*, 8 *Leigh*, 120; see also, in 1846, *Harrison Justices v. Holland*, 3 *Gratt.* 236, a navigation case; in 1871, *Langhorn v. Robinson*, 20 *Id.* 661; and 5 *Call*, 139.

In 1843 in Connecticut: *Bridgeport v. Housatonic R. R. Co.*, 15 *Conn.* 475; see also in 1860, *Society for Savings v. New London*, 29 *Conn.* 174.

In 1846 in Pennsylvania: *Harvey v. Lloyd*, 3 *Pa. St.* 331; see also in 1849, *Commonwealth v. McWil-*

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liams, 11 *Id.* 62, a turnpike case; in 1853, the great case of Sharpless v. Mayor of Philadelphia, 21 *Id.* 147; Moers v. City of Reading, 21 *Id.* 188; in 1858, Commonwealth v. Commissioners Allegheny Co., 32 *Id.* 218; in 1861, Commonwealth v. Pittsburgh, 41 *Id.* 278; in 1862, Commonwealth v. Perkins, 43 *Id.* 400.

In Tennessee in 1848: Nichols v. Nashville, 9 *Humph.* 252, 271; see also in 1854, L. & N. R. Co. v. Davidson Co., 1 *Sneed*, 637; in 1859, Hord v. Rodgersville, &c. R. R. Co., 3 *Head*, 208; Byrd v. Ralston, 3 *Id.* 477; in 1869, Justices of Campbell Co. v. Knoxville & Ky. R. R. Co., 6 *Coldwell*, 598.

In Kentucky in 1849: Talbott v. Dent, 9 *B. Monr.* 556; see also in 1850, Justices, &c. v. P. W. & K. R. River Turnpike Co., 11 *Id.* 143; in 1852, Slack v. Maysville & C. R. R. Co., 13 *Id.* 1; in 1859, Maddox v. Graham, 2 *Metc.* 56.

In Illinois in 1851: Ryder v. A. & S. R. R. Co., 13 *Ill.* 516; see also in 1858, Prettyman v. Sup. Tazewell Co., 19 *Id.* 406; in 1859, Robertson v. Rockford, 21 *Id.* 451; in 1860, Johnson v. Starke Co., 24 *Id.* 75; Perkins v. Lewis, 24 *Id.* 208; in 1861, Butler v. Dunham, 27 *Id.* 474; in 1862, Clarke v. Hancock Co., 27 *Id.* 305; Piatt v. People, 29 *Id.* 54; in 1864, Keithsburch v. Frick, 34 *Id.* 405.

In Florida in 1852: Cotton v. County Commissioners, 6 *Fla.* 610.

In Ohio in 1852: C. N. & Z. R. R. Co. v. Commissioners Clinton Co., 1 *Ohio St.* 77; R. W. v. Treasurer N. Tp., 1 *Id.* 105; see also in 1853, Cass v. Dillon, 2 *Id.* 607; Thompson v. Kelley, 2 *Id.* 647; in 1857, State v. Van Horn, 7 *Id.* 327; in 1858, State v. Union Tp., 8 *Id.* 394; in 1861, State v. Commissioners Hancock Co., 12 *Id.* 596; in 1863, Knox v. Nichols, 14 *Id.* 260; Fosdick v. Perrysburg, 14 *Id.* 472; Shoemaker v. Goshen Tp., 14 *Id.* 569.

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In Louisiana in 1853: *Police Jury v. McDonough*, 8 *La. Ann.* 341; see also in 1854, *New Orleans v. Graible*, 9 *Id.* 561; in 1856, *Parker v. Scogin*, 11 *Id.* 629; *V. S. & T. R. W. Co. v. Parish of Onachita*, 11 *Id.* 649.

In Iowa in 1853: *D. & P. R. R. Co. v. Dubuque*, 4 *Greene*, 1; see also in 1854, *State v. Bissell*, *Id.* 328; in 1857, *Clapp v. Cedar Co.*, 5 *Iowa*, 15; in 1858, *Ring v. Johnson Co.*, 6 *Id.* 265; *McMillen v. Boyles*, 6 *Id.* 304; *McMillen v. Lee Co.*, 6 *Id.* 391; in 1859, *Whittaker v. Johnson Co.*, 10 *Id.* 181.

In Alabama in 1854: *Stein v. Mayor of Mobile*, 24 *Ala.* 591; see also in 1857, *Wetumpka v. Winter*, 29 *Id.* 651; a plank-road case; in 1860, *Gibbons v. Mobile*, 36 *Ala.*, 410.

In Mississippi in about the year 1854: *Strickland v. Miss. Central R. R. Co.*, not reported, but referred to in the case of *Williams v. Cammack*, 27 *Miss.* 224.

In North Carolina in 1855: *Taylor v. Newburn*, 2 *Jones Eq.* 141, a navigation case; see also in 1858, *Caldwell v. Justices of Burk*, 4 *Id.* 323.

In Missouri in 1856: *City of St. Louis v. Alexander*, 23 *Mo.*, 483; see also in 1863, *Flagg v. Palmyra*, 33 *Id.*, 440; in 1867, *St. Joseph & C. R. R. v. Buchanan Co.*, 39 *Mo.*, 485.

In New York in 1857: *Grant v. Carter*, 24 *Barb.* 232; *Benson v. Mayor of Albany*, 24 *Id.* 248; *Clark v. City of Rochester*, *Id.* 446; see also in 1858, *Bank of Rome v. Village of Rome*, 18 *N. Y.* 38; in 1859, *Gould v. Town of Venice*, 29 *Barb.* 442; in 1861, *Starin v. Genoa*, 23 *N. Y.* 439; in 1864, *Clark v. City of Rochester*, 28 *Id.* 605; in 1865, *People v. Mitchell*, 45 *Barb.* 208; in 1866, *People v. Mitchell*, 35 *N. Y.* 551.

In South Carolina in 1857: *Copes v. Charleston*, 10 *Rich.* 491.

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In Georgia in 1857: *Winn v. Macon*, 21 *Ga.* 275; *Powers v. Inf. Ct. of Dougherty Co.*, 23 *Id.* 65.

In Indiana in 1857: *Aurora v. West*, 9 *Ind.* 74; see also in 1860, *Evansville, &c. R. R. Co. v. Evansville*, 15 *Id.* 395; in 1862, *Bartholomew Co. v. Bright*, 18 *Id.* 93; in 1864, *Aurora v. West*, 22 *Id.* 88.

In the United States supreme court in 1858; *Commissioners of Knox Co. v. Aspinwall*, 21 *How.* 539; *Same v. Wallace*, 21 *Id.* 547; see also in 1859, *Zabriskie v. R. R. Co.*, 13 *Id.* 381; in 1860, *Bissell v. City of Jefferson*, *Id.* 287; *Amey v. Alleghany Co.*, *Id.* 365; *Commissioners Knox Co. v. Aspinwall*, *Id.* 376; in 1861, *Woods v. Lawrence Co.*, 1 *Black*, 386; in 1862, 2 *Id.* 722; in 1863, 1 *Wall.* 83, 175, 272, 291, 384, five cases; in 1865, 3 *Id.* 93, 294, 327, 654, four cases; in 1866, 4 *Id.* 270, 275, 535, three cases; in 1867, 6 *Id.* 166, 210, 514, 518, four cases; in 1868, 7 *Id.*, 181, 313, two cases; in 1869, 9 *Id.* 477 (there are too many cases to give the titles to all of them).

In Wisconsin in 1859: *Clark v. Janesville*, 10 *Wis.* 136; also see in 1860, *Bushnell v. Beloit*, 10 *Id.* 195.

In California in 1859: *Pattison v. Supervisors of Yuba Co.*, 13 *Cal.*, 175; also in 1860, *Hobart v. Supervisors of Butte Co.*, 17 *Id.* 23; in 1863, *Robinson v. Bidwell*, 22 *Id.*, 379; in 1864, *French v. Teschemaker*, 24 *Id.* 518; *People v. Coon*, 25 *Id.* 635; in 1865, *People v. Supervisors of San Francisco*, 27 *Id.* 655.

In Maine in 1860: *Augusta Bank v. Augusta*, 49 *Me.* 507.

In Kansas in 1864; in West Virginia in 1865; in Texas in 1866; in Nevada in 1869, and in Vermont in 1870. The decisions in the five last mentioned States are hereinafter cited.

But we are not left alone with the construction given to the term legislative power, by the legislative, executive, and judicial departments of other States and of the United States. We have a construction of our own,

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given to said term by the legislative and the executive departments of the then territory of Kansas before and during the time the constitution was being framed. In 1858 the legislature and the governor of said Territory authorized the city of Atchison to subscribe for stock in and issue bonds to railroad companies. *Private Laws of 1858*, p. 182, §§ 30, 31. In 1859 the next legislature and the governor of said territory authorized Leavenworth county to make similar subscriptions and to issue bonds in payment therefor (*Gen. Laws of 1859*, p. 69); and on the same day (February 11, 1859) they took the initiatory steps in framing the present constitution of the State of Kansas. On that day they passed the act under which the constitution was framed (*Gen. Laws 1859*, p. 292); and on that day they gave a construction to the term "legislative power" with reference to municipal aid to railroad companies. And this construction the people have never overruled or repudiated in framing their constitution, or in any other manner, from that time till the present. In 1860, after the people had adopted the constitution, but while it was still pending before Congress, and before the State was admitted into the Union under it, another territorial legislature and another territorial governor again determined in favor of the power of the legislature to pass acts granting municipal aid to railroad companies. They passed three acts recognizing this power—one for Leavenworth county (*Gen. Laws 1860*, p. 29), one for Leavenworth city (*Id.* p. 32), and one for the city of Atchison (*Private Laws 1860*, p. 53).

We suppose that nobody will claim that the territorial legislature had more power in this respect than the State legislature. The territorial legislature had nothing but legislative power, and that is just what the State legislature have. The territorial legislature held their authority under the "organic act," which pro-

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vides "that the legislative power and authority of said territory shall be vested in the governor and legislative assembly." § 22. The State legislature hold theirs under the State constitution. The organic act was framed by Congress; the constitution was framed by the people of the State. The territorial legislature had all the legislative power in this respect that Congress had power to give them. The State legislature have all the legislative power that the people of the State have power to give them. Then whose power is the greatest—that of the territorial legislature, or that of the State legislature? That of Congress, or that of the people in the primary capacity? It has generally been supposed, and we presume it will be so conceded, that the power of the people in their primary capacity is unbounded, unlimited. Is it so with Congress? Has any jurist ever said that it was so? Will any lawyer of any respectability hazard his professional reputation by declaring that it is so? We think not, and yet we shall not in the least question the power of Congress upon this particular subject. In fact, this court has already decided that Congress possesses all the power necessary upon this particular subject. *Burnes v. Atchison*, 2 *Kas.* 454; *Atchison v. Butcher*, 3 *Id.* 104.

With all this before us, is it possible to come to any other conclusion than that the people knew what was generally understood by the term "legislative power," and that they adopted the constitution with that construction. "The constitution must receive an interpretation according to the sense in which the people are supposed to have understood its language." *Mayor, &c. of Baltimore v. State*, 15 *Md.* 376, 461; *Maillard v. Lawrence*, 16 *How. U. S.* 251, 261; *Wetumpka v. Winter*, 29 *Ala.* 651, 660. The foregoing conclusion must also follow, because this general understanding before and after the adoption of our constitution was a contemporaneous construction

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of said term (*Cooley Const. Lim.* 67, and cases there cited ; *Portland Bank v. Apthorp*, 12 *Mass.* 257) ; and also because whenever a provision of law is adopted by one State from another, as this constitutional provision of ours was, the judicial construction given to it in the State where it originated, follows it to the State of its adoption. *Bemis v. Becker*, 1 *Kas.* 226, 248, 249 ; *Stebbins v. Guthrie*, 4 *Id.* 353, 364 ; *Drennan v. People*, 10 *Mich.* 175 to 177. But even the passage of said acts by our own territorial legislature before the adoption of the constitution is of itself sufficient, in the absence of anything to the contrary, to show that the people of the State intended to confer upon the State legislature power to authorize municipal aid to railroad companies ; for as the territorial legislature had repeatedly exercised such power as legislative power, it must necessarily be presumed that the State legislature acting for the same community would also exercise such power as legislative power unless prohibited therefrom. But as there is no such prohibition in the constitution it must necessarily follow that the people of the State intended by leaving such prohibition out of the constitution, that the legislature should continue to exercise such power as legislative power. *Mayor, &c. of Baltimore v. State*, 15 *Md.* 376, 461 ; 2 *Gill & J.* 284, 285. Laws in force at the time the constitution is framed must be considered as the ground-work and basis of the constitution itself. See last case cited.

Since the adoption of the constitution of this State, four or five other States besides those that we have already mentioned as having decided the question before our admission, have declared in favor of the constitutional validity of acts granting municipal aid to railroad companies. *Kansas* : *Burnes v. Atchison*, 2 *Kas.* 454, decided in 1864 ; *Atchison v. Butcher*, 3 *Id.* 104, decided in 1865 ; and *State ex rel. Hurd v. Mayor and Council of the City of Leavenworth*, not reported, de-

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cided in 1868. West Virginia: *Goshorn v. Sup. Ohio Co.*, 1 *West Va.* 808, decided in 1865. Texas: *San Antonio v. Jones*, 28 *Tex.* 19, decided in 1866. Nevada: *Gibson v. Mason*, 5 *Nev.* 283, decided in 1869. And the same doctrine has recently been recognized in Vermont: *Danville v. R. R. Co.*, 43 *Vt.* 144, decided in 1870—making in all about twenty-seven States, and the United States.

All of the States have, impliedly at least, declared what we consider to be the true doctrine, that the general grant of legislative power carries with it the power to pass acts authorizing county and municipal aid to railroad companies, and in some of the States the courts have expressly so decided. 2 *Kas.* 454, 486; 3 *Wall.* 327, 654; 35 *N. Y.* 551; 24 *Barb.* 232, 248, 446; 4 *Jones Eq. (N. C.)* 324; 10 *Rich. (S. C.)* 495, 501.

3. The real question in this case is, whether the legislature has the constitutional power to authorize counties and municipal corporations to *subscribe for stock* in railroad companies, and to issue their bonds in *payment* therefor, and not whether the legislature has power to authorize counties and municipal corporations to make *donations* to railroad companies. In favor of the power to make subscriptions, &c., we have the decisions of about twenty-six States. Against the power we have the decisions of one State alone, and that is Iowa. The principal decisions in Iowa against this power are: *State v. Wapello Co.*, 13 *Iowa*, 388; *Chamberlain v. Burlington*, 19 *Id.* 395; and *McClure v. Owen*, 26 *Id.* 243. But the supreme court of the United States has overruled all these decisions. *Gelpcke v. City of Dubuque*, 1 *Wall.* 175; *Meyers v. Muscatine*, *Id.* 384; *Thompson v. Lee Co.*, 3 *Id.* 327; *Rodgers v. Burlington*, *Id.*, 654; *Riggs v. Johnson Co.*, 6 *Id.* 166; *Weber v. Lee Co.*, *Id.* 210; *U. S. v. Council of Keokuk*, *Id.* 514, 518; *Benbow v. Iowa City*, 7

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Id. 313; *Lee Co. v. Rodgers, Id.* 181. But it has been denied by very high authority that any decision has ever been made even in Iowa declaring the unconstitutionality of such acts as we are now considering. *Hansen v. Vernon, 27 Iowa, 30, 78 to 80*; *Stewart v. Supervisors of Polk Co., 30 Id. 10, 28, et seq.* But admitting that such decisions have been made in Iowa, still the same court (as well as the supreme court of the United States) in a more recent decision have swept away every vestige of the principle upon which the former decisions of the supreme court of Iowa are supposed to have been founded. *Stewart v. Supervisors of Polk Co., 30 Iowa, 9*; *King v. Wilson, 3 Chicago Legal News, 137*; *1 Dill. Circ. Ct. 555*. Hence no court of last resort can now be found, that holds that county and municipal aid to railroad companies by way of subscription to the capital stock thereof, is not a legitimate subject of legislation. There are, however, now just four decisions in the United States against the validity of *donations* to railroad companies; one in New York: *Stewart v. Hulbert, 51 Barb. 312*; one in Iowa: *Hansen v. Vernon, 27 Iowa, 35*; one in Wisconsin: *Whitney v. Sheboygan R. R. Co., 25 Wis. 167*; and one in Michigan: *People v. Salem, 20 Mich. 452*. The first of these decisions is entitled to but little consideration as a precedent, as it was not rendered by a court of last resort. The second has since been overruled by the same court. *Stewart v. Supervisors of Polk Co., 30 Iowa, 9*. This leaves two decisions only—one in Wisconsin, and one in Michigan, standing solitary and alone, in opposition to even this species of legislation; and these are not authorities, as we shall presently see, against *subscriptions to the capital stock* of railroad companies. The supreme court of Wisconsin is composed of three judges, one of whom dissented. The supreme court of Michigan is composed of four judges, one of whom

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dissented. The court of appeals in New York, the court of last resort in the State, decide in favor of the validity of *subscriptions*. *Bank of Rome v. Village of Rome*, 18 *N. Y.* 38; *Starin v. Genoa*, 23 *Id.* 439; *Clark v. City of Rochester*, 28 *Id.* 605; *People v. Mitchell*, 35 *Id.* 551; and the court rendering the decision reported in 51 *Barb.* 312, acknowledge the binding force of the decisions made by the court of appeals, but claim that there is a material difference between donations and subscriptions; that they are not both governed by the same principles; that one may be valid and the other invalid. The supreme court of Wisconsin decides in favor of the validity of *subscriptions* (*Clark v. Janesville*, 10 *Wis.*, 136; *Bushnell v. Beloit*, 10 *Id.* 195); and against the validity of *donations*. *Whiting v. Sheboygan R. R. Co.*, 25 *Id.* 167. In the latter case the court made two decisions, and in each decision they made a labored argument to show a distinction between subscriptions and donations, and to show that the former are valid and the latter invalid. 25 *Wis.* 186, 209. See also note of Mr. Justice DILLON (who wrote the opinion of the court in the case of *Hansen v. Vernon*, 27 *Iowa*, 35), published in the 9 *Am. Law Reg. N. S.* 172, 175.

We suppose that it will be admitted that it is a duty incumbent upon all governments to provide suitable and sufficient facilities for the travel and commerce of the country. Canals, roads, bridges, and other artificial means of passage and transportation from one part of the country to the other, have been made by the sovereign power and at the public expense, in every civilized State of ancient and modern times. And to-day this State constructs through the agency of subordinate public corporations all our common roads, bridges, and thoroughfares. In many parts of the civilized world, and particularly on the continent of Europe, (and in every part it might be done), the railroads of

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the country are constructed, owned, and operated by the government. Many of the States of this Union have constructed, owned, and operated both railroads and canals, and their right to do so, so far as we are informed, has never been questioned. Some of the States are doing this very thing to-day, without the least suspicion that they are transcending the legitimate bounds of governmental jurisdiction. It must, therefore, be admitted that in the absence of constitutional restrictions, this State might construct, own, and operate, all the railroads within the boundaries of the State. It must also be admitted that whatever the State may do in providing artificial means of travel and transportation, it may do through the agency of subordinate public corporations, such as counties, cities, towns, and villages, which may be locally benefited by such improvements. We have already seen that there is no constitutional restriction upon constructing works of internal improvement through the agency of subordinate public corporations, such as counties, cities, towns, and villages. Hence it logically follows that the State may, through the agency of such subordinate public corporations, construct, own, and operate all the railroads within her territorial boundaries. It will also be admitted that the State may construct railroads through the agency of private corporations, or of private individuals. Now, if the construction of a railroad is a public duty which the State may either cause to be done entirely through the agency of public corporations, and at the public expense, or entirely through the agency of private corporations or private individuals, it seems to follow as a logical consequence that such a work may be done partly through the agency of a public corporation, and partly through the agency of a private corporation or of private individuals. If private enterprise will take hold of such public improvements and construct them, all experi-

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ence has shown that it is better to let private enterprise do it. But if private enterprise will only perform a part, is it not better to let private enterprise perform that part, and the public perform the other part, than that the public shall be entirely deprived of all the benefits of such necessary and valuable improvements? And further, if a county should purchase all of the stock in a railroad company, the county would then own the entire road, and might, we presume, operate the same without any grave constitutional objection being urged against such a transaction. Then why may not the county purchase a portion of the stock, and operate the road in conjunction with the other stockholders, who are private individuals, and who own the remainder of the stock?

While there is an obvious distinction between subscriptions and donations, still we do not suppose that the Wisconsin and Michigan decisions are founded entirely upon the doctrine that donations to railroad companies are illegal, simply because they are donations. The power of governments and governmental organizations to make donations has been exercised ever since governments were instituted, and, we presume, always will be. Swords, banners, and other mementos for meritorious conduct, have always been, and, we suppose, always will be donated by governments and municipal organizations. Two hundred thousand dollars in money, and a township of land, were donated in 1824 by the general government to General La Fayette. Millions of dollars as pensions, and millions of acres of land, and land warrants, have been donated to the soldiers of the republic since its organization. And the government is now generously donating artificial limbs to disabled soldiers who lost limbs in the war of the rebellion. During the rebellion, the general government, and almost every loyal State, county, city, township, and

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hamlet, gave bounties to soldiers enlisting in the service of their country. Bounties have been everywhere given for the destruction of wild beasts and other public pests. This State is now giving bounties to those who grow forest trees, plant hedges, and build stone fences. *Gen. Stat.* 465, 1094. Schools are made free for the poor as well as for the rich. Asylums are established for the deaf, dumb, blind, and insane. Hospitals are opened in many parts of the world for the sick, the diseased, the disabled, and the infirm. The poor and the destitute are fed and clothed at the public expense. Homesteads are given by the general government to actual settlers upon the public lands. And many millions of acres of the *public lands* have been *donated to railroad companies* by the general government within the last thirty years. If the Wisconsin and Michigan courts had simply said that *donations* to railroad companies were illegal because they were *donations*, their decisions would not affect this case in the least ; but they have gone farther, and have said that they are illegal because they are given to railroad companies. The reasons given why donations to railroad companies are illegal are, *first*, that railroad companies are *private* corporations (forgetting of course that such donations as are everywhere admitted to be legal, are nearly always given to *private* corporations or to *private* individuals) ; and *second*, that said donations are given for a *private purpose*. Now whatever may be the case with reference to municipal aid to railroad companies being a private purpose, in Wisconsin or Michigan, we think we have already demonstrated that such is not the case in Kansas ; that the people of Kansas, in their primary capacity, in framing their constitution have determined otherwise, and, as we shall attempt to show, have determined rightly. But whether rightly or wrongly, from the people in their primary capacity there is no appeal. Their decision is

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final. Whatever they have determined in and by their constitution, we must determine. We are not above the constitution. We as judges are the mere creatures of it, and hold our authority under it, and from it, and must decide as it decides. Any other course would be usurpation. If we do not carry out the provisions of the constitution as the people understood them when they framed it, we are unworthy to hold the places we fill. It can hardly be supposed that when the people framed their constitution they intended to bring into existence a tribunal greater than the constitution itself; a tribunal with such potential force that it could destroy the provisions of the instrument upon which its own life and existence depends. It has heretofore been supposed by statesmen and jurists, that the constitution was a permanent and inflexible instrument; that it was the photograph of the people's *will*, indelibly fixed, and could only be amended by the people themselves in the prescribed form. It has heretofore been supposed that if a new truth, however valuable, should be discovered, the courts, however strong the temptation might be to startle the world with the announcement of it, would have no right to insert it in the constitution by judicial construction, or interpretation, but must wait and let the people in their own proper time, make the desired amendment. And even where a society has outgrown its constitution it has never been supposed that the courts could, through the means of judicial construction, so amend it as to bring it up to the wants and needs of the more improved and further advanced condition of society.

We deny both the grounds on which it is claimed that municipal aid to railroad companies is unconstitutional. We deny that railroad companies are *strictly private* corporations, although we do not claim that they are strictly public corporations; and we deny that municipal aid to railroad companies is *strictly for a*

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private use, although we do not claim that it is wholly for a public use, though the object intended by the government is a public purpose; and we further say that it makes no difference, so far as this case is concerned, whether a railroad company, as a company, is a *private* corporation or not. The whole question depends upon the ultimate object, use, or purpose, intended by the government in granting the aid to railroad companies—whether that object, use, or purpose is public or private, and not upon the nature or character of the means used in effecting or accomplishing that object.

This whole question has been argued as though it depended entirely upon the sovereign power of taxation. We do not think that it does, but as it has been so argued, we cannot well escape discussing the question to some extent in the same manner. The argument for plaintiffs in error in substance is this: 1. The dividends on the railroad stock which the county gets for its bonds, together with the stock itself, and all other resources of the county aside from taxation, will not pay the interest and principal of said bonds as the same become due; therefore the county will have to resort to taxation in order to pay said interest and principal. 2. Taxation can only be resorted to for a public purpose. 3. A railroad company is a strictly private corporation, and subscribing for stock therein and issuing bonds thereto, is a strictly private purpose. 4. Therefore such subscriptions, &c., are unconstitutional. Now, we admit the first and second of these propositions, and deny the third and fourth. And we might here say that we admit what are claimed to be the three fundamental principles of taxation: 1. Taxation must be for a public and not merely a private purpose. 2. The taxes must be properly apportioned. 3. The district taxed must have a special interest in and be specially benefited by the thing for which the

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taxes are levied. Taxation is not an independent power to be exercised aside from the other powers of the government. No society of men ever organized into a government, or into a municipal corporation, for the mere purpose of taxing themselves. The power of taxation can never be invoked except in aid of one of the other powers. It is not of itself a sufficient foundation upon which to build any other power or action of the government. It is only a servant of the other powers, and can only be exercised in their support. And if the right to make county and municipal subscriptions to railroad companies is founded upon no other power except the power of taxation, we admit it has no foundation whatever, and must of course fall. But on the other hand, if it be conceded that every other objection to the making of said subscriptions is removed—that nothing else stands in the way—that everything else is favorable—that the right of the government is otherwise perfect—then everything is virtually conceded, for the power of taxation (or the want of such power), can never be in the way of the exercise of any of the other powers of government, but must always, when necessary, contribute thereto. The power of taxation is the most universal power possessed by governments. It is coextensive with every other power—it is an incident, a concomitant, an auxiliary of every other power. Whenever the government can act at all it can resort to the power of taxation if necessary to make its action effective. And although the government has no right to interfere in private affairs at all, yet whenever the public interest, the public honor, the public gratitude, or public charity requires it, the government may resort to its sovereign power of taxation without limit, until its interest, its honor, its gratitude, or charity is entirely satisfied. Then it is that the power of the government, and the power of the legislature acting for the government, becomes unbounded,

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for the courts, whose duty it is simply to expound and declare the law, have no scales by which to determine the amount of the public interest, the amount of the public honor, the amount of the public gratitude, or the amount of the public charity, which will support and sustain taxation. This duty rests upon another branch of the government—the legislature; and it rests wholly in their discretion. That these views are correct we refer to the following authorities: *Cooley Const. Lim.* 219, *et seq.* and cases there cited; *Id.* 479, *et seq.* and cases there cited; *Id.* 129, 488; *Town of Guildford v. Sup. Chenango Co.*, 13 *N. Y.* 143, 149; *Booth v. Woodbury*, 32 *Conn.* 128; *Broadhead v. City of Milwaukee*, 19 *Wis.* 652; *Speer v. School Directors of Blairsville*, 50 *Penn. St.* 150; *Waldo v. Portland*, 33 *Conn.* 363; *Bartholomew v. Horwinton*, *Id.* 408; *Lowell v. Oliver*, 8 *Allen*, 247; *McCulloch v. Maryland*, 4 *Wheat.* 425 to 435.

4. Let us now examine into the character of railroad companies so as to determine whether they are *public*, *quasi public*, or *private* corporations. For more than eighteen years, from 1852 up to 1870, when the case of *People v. Salem*, 20 *Mich.* 452, was decided, the doctrine of the supreme court of Michigan was that railroad companies were public, or *quasi* public corporations. In the case of *Swan v. Williams*, 2 *Mich.* 427, decided in 1852, that supreme court says: "Most certain it is, that as to all their rights, powers, and responsibilities, three grand classes of corporations exist. *First.* Political or municipal corporations, such as counties, towns, cities and villages, which from their nature are subject to the unlimited control of the legislature. *Second.* Those associations which are created for public benefit, and to which the government delegates a portion of its sovereign power, to be exercised for public utility, such as turnpike, bridge, canal and railroad companies; and, *Third.* Strictly private cor-

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porations, where the private interest of the corporators is the primary object of the association, such as banking, insurance, manufacturing, and trading companies." . . . "The *object* defines the *character* of these associations, by whatever name they may be styled." . . . "The object which determines the character of a corporation is that *designed by the legislature* rather than that *sought by the company*. If that object be primarily the private interests of its members, although an incidental benefit may accrue to the government therefrom, then the corporation is private; but if that object be the public interest, to be secured by the exercise of powers *delegated for that purpose*, which would otherwise repose in the State, then, although *private interests* may be incidentally promoted, the corporation is in its nature *public*—it is essentially the *trustee* of the government for the promotion of the objects desired—a mere *agent* to which authority is delegated to work out the public interests through the means provided by government for that purpose, and broadly distinguishable from one created for the attainment of no public end, and from which no benefit accrues to the community except such as results incidentally and not necessarily from its operation. In the creation of this class of corporations, *public duties* and *public interests* are involved, and the discharge of those duties and the attainment of those interests are the primary objects to be worked out through the powers delegated through them. To secure these, the right of pre-*eminent sovereignty* is exercised by the condemnation of lands to their use, a right which can never be exercised for private purposes. *How, then, can they be regarded as private associations*, from the acts of which an *incidental* benefit only springs to the public?" "Nor can it be said that the property, when taken, is not used by the public, but by the corporators, for their own profit and

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advantage. It is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emolument on the part of the corporators ; but it is none the less true that the object of the government in creating them is public utility, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the service." 2 Mich. 434 to 436.

In the case of the Miners' Ditch Co. v. Zelerbach, 37 Cal. 543, 577, Chief Justice SAWYER says : "There are several classes of corporations, such as public municipal corporations, the leading object of which is to promote the public interest ; corporations technically private, but yet of a *quasi public character*, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important government powers, such as an exercise of the right of eminent domain ; of this class are *railroad*, turnpike and canal companies ; and corporations *strictly private*, the direct object of which is to promote private interests, and in which the public has no concern, except the indirect benefit resulting from the promotion of trade and the development of the general resources of the country."

In the case of Osborn v. United States Bank, 9 Wheat. 738, three important questions were decided : *First*. That Congress had no power to create *private* corporations, the federal government being a government of delegated powers, and the power to create *private corporations* not being among the powers delegated. *Second*. That Congress had power to create corporations as instrumentalities by which to carry out a delegated power, and that such corporations were to be classed as *public corporations*. *Third*. That a banking corporation created for such a purpose, although four-fifths of its capital stock was

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owned by private individuals, and it was engaged, in part, in *private banking* business from which *private* and individual profit was derived (8 *U. S. Stat. at L.* 286, *et seq.*) was nevertheless a *public corporation*. Chief Justice MARSHALL, who delivered the opinion of the court, said: "The bank is not considered as a private corporation whose principal object is individual trade and individual profit, but as a *public corporation*, created for *public and national purposes*. That the mere business of banking is in its own nature a private business, and may be carried on by individuals and companies having *no political connection* with the government, is admitted; but the bank is not such an individual company. *It was not created for its own sake, or for private purposes*. It has never been supposed that Congress could create such a corporation. It is not an instrument which the government found ready-made, and was supposed to be adapted to its purposes, but one which was created in the form in which it now appears, *for national purposes only*. It is undoubtedly capable of transacting *private* as well as *public* business. While it is the great instrument by which the fiscal operations of the government are effected, *it is also trading with individuals for its own advantage*. The appellant endeavors to distinguish between this trade and its *agency for the public*, between its banking operations and those qualities which it possesses in common with every other corporation, such as individuality, immortality," &c. 9 *Wheat.* 860, 861.

In this State the register of deeds accepts his office for *private* gain and emolument. His business is with and for *private* individuals. He is paid by the individuals. He is paid by the individuals for whom he does the work, and not by the State or the county. Is he a *public officer*, or *strictly a private* individual? This same question might be asked with equal propriety

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with regard to several other public officers. In this connection, we would refer to the following authorities : 18 *Wend.* 9, 15, 16 ; 3 *Paige*, 45, 75 ; 8 *Dana*, 296 ; 3 *Wis.* 612 ; 6 *Id.* 636 ; 10 *Id.* 280 ; 2 *Dev. & Bat. (N. C.)* 468 ; 61 *Penn St.* 27 ; 2 *N. H.* 25 ; 5 *Nevada*, 285, 307, *et seq.* and cases there cited ; 21 *Penn St.*, 47, 179 ; 13 *Wis.* 43.

It is undoubtedly true that railroad companies, in contradistinction to municipal corporations, are always classed as private corporations ; and with this classification we find no fault ; but to class them with other private corporations, is a great mistake. They differ materially from all other private corporations in many respects, and with reference to them, ought to be classed as public. The sovereign power of eminent domain, which is always conferred upon railroad companies, has never been and could not be conferred upon a strictly private corporation. And the government exercises a control over railroad companies in compelling them to carry passengers and freight, and in regulating the prices of the same to an extent never exercised over strictly private corporations or private persons. The power exercised by municipal corporations in regulating the fares of hackmen and draymen comes nearest to that exercised by the legislature in regulating fares and freights of railroad companies. But the former is only a police regulation in cities, while the latter is the exercise of a sovereign legislative power, founded upon the doctrine that a railroad company is a *public agency of the government*. And there are other distinctions between railroad companies and hackmen and draymen which we will hereafter mention as we proceed with this discussion. It will be admitted that a strictly private railroad corporation might be organized under the authority of the legislature, a corporation whose powers and duties would be similar in all respects to other private carriers of freight and passengers, such

as the proprietors of stage-coaches, hacks, drays, &c. ; and while such railroad corporation would be relieved, as other private carriers of freight and passengers are from many of the restraints and duties of a public or *quasi* public railroad corporation ; while it would, of course, be free to carry any kind of freight it chose, or exclude all, and carry freight only for itself, yet it could not exercise the right of eminent domain as a public or *quasi* public railroad corporation does. It would have to purchase the land over which it should construct its road ; but if the owner of the land would not sell, it could not build its road ; its progress would necessarily come to an abrupt termination.

But as we have before stated, it makes no difference whether we call a railroad company a public, *quasi* public, or a strictly private corporation. It is the ultimate end, object and purpose, that must determine the power of the legislature to act in the premises, and not the nature or character of the corporation or person through whose intermediate agency, this end, object, or purpose, is expected to be accomplished. Nearly all the public works of this State, and of counties, cities, towns and villages, have been accomplished through the agency of private corporations, or of private individuals. The work is usually let by contract to the lowest bidder, and no one has ever yet supposed that it was illegal because it was not done by a public officer or a public corporation. The most of the public printing of this State has been done by private persons ; for up to 1869 we had no public printer. The public buildings are erected, mails carried, goods transported, and many other things we might mention, are done for the public by private corporations or private persons. And it has never been contended, nor with reference to any other class of cases, that the government could accomplish a public purpose only through the agency of a public servant. It has therefore been supposed

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that whatever the government did through the agency of a private corporation or private individual it did itself; *qui facit per alium, facit per se*; and what valid objection can there now be raised to the government accomplishing a public purpose through a private agency? For the purposes then of this argument we may well admit that a railroad company is a *private* corporation; though we shall, of course, claim that the use of a railroad is a public use or purpose. But it is not only claimed that a railroad company is a private corporation, but it is also claimed that the property it possesses is strictly private property. And therefore it is claimed with great confidence that the use of such property must necessarily be strictly and absolutely a private use or purpose. A glaring *non sequitur*. A fallacy that ignores one of the fundamental principles of law—a principle older than railroads, older than any living jurist, old as law itself—the principle that the title to a thing and the possession thereof may be vested in one person for the use and benefit of another. The government seldom owns the building in which a post-office is kept; it seldom owns any material portion of the furniture of the post-office; and is the use of such property, for that reason, purely and strictly a private use? Suppose the State should employ an individual to carry stationery from the depot in North Topeka to the state-house; would the transportation of such property be any the less a public purpose because the person so employed might be a private individual, and the wagon and horses with which he should transport the stationery might be private property? And will it be contended that no taxes could be levied nor public funds used to pay for the services of a postmaster and for the use of his house and furniture, or to pay for the services of said individual, and for the use of his horses and wagon, simply because the post-office and furniture and the horses and

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wagon are private property? And will it be contended that the carrying of said stationery is purely and strictly a private purpose? It may be private with regard to the individual, but it is public with regard to the State and the public.

We have the combined authority of every legislature, of every executive, and of every court in the United States that the construction and operation of a railroad, even in the hands of a (usually called) private corporation, is a public purpose; for if it were otherwise every lawyer in the land knows that the sovereign power of eminent domain could not be exercised in its favor. This ought to be conclusive of the question; but it is said it is not *such* a public purpose as will support taxation. Strange indeed! The power of eminent domain is limited in its scope and operation to but few subjects. At every step it is traversed and opposed. Everywhere the plea of inexorable necessity must be interposed in its favor or its progress is ended. Not so with taxation. As we have already seen, taxation is the most universal, broad, sweeping and unlimited power possessed by governments. It is the power to destroy, and has no limit except in the will of the sovereign. Per MARSHALL, Ch. J., in *McCullough v. Maryland*, 4 *Wheat.* 316, 425 to 436. No instance has been shown nor can be shown where the government may aid a thing by the power of eminent domain, where it cannot also aid it by the power of taxation. No instance has been shown nor can be shown where the government can aid a thing by the exercise of any of its sovereign powers, where it may not also aid it by taxation.

A railroad is a public purpose because it increases the facility for travel and transportation from one part of the country to another. In this respect it is a great and inestimable public benefit, which may be better described by others than by the courts. And yet

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there are other public benefits incidentally springing from the construction and operation of railroads. The increased value of all property within their vicinity is one; but this is probably only a measure of the value of the increased facility for travel and transportation. The increase of the public revenue is another, and this, or rather the decrease of the public burdens, cannot be overestimated. As railroads progress, agriculture, trade and commerce, with all the arts and sciences of an enlightened civilization follow in close proximity and with a celerity that would astonish the inhabitants of fairy land. Cities, towns, and villages spring up with a marvelous growth that would rival the fabulous creations of Aladdin and his wonderful lamp; and in districts where the tax collector was never before known, immense revenues flow into the public treasury with a copiousness and a profusion that would astonish the wealthiest of the sovereigns of ancient or modern times. In Wisconsin it seems to be considered that the mere taking of stock in a railroad company, by a municipal corporation, is sufficient of itself to make the railroad a public purpose, such as will sustain taxation and render the act of the legislature authorizing it valid. *Whiting v. Sheboygan R. R. Co.*, 25 *Wis.* 167, 186, 209. Now while we do not wish to contravert this doctrine, still we do not wish to found such a broad superstructure upon such a narrow basis. If a railroad company is purely a private corporation, and if the construction and operation thereof is purely a private purpose, neither the government nor any municipal corporation has any right to become a stockholder therein. Governments were not organized for the purpose of engaging in private enterprises or private business, but only for the transaction and promotion of public affairs. Even if the purchase of stock in a railroad company should be a paying transaction as an investment (which, unfortunately for counties and

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municipal corporations, it is not), still a governmental organization would have no right, for that reason alone, to engage in it, for governmental organizations are not created for purposes of speculation, nor are they created for the purpose of enriching the organization as such, but only for the purpose of promoting the general welfare of the individual members thereof as citizens. The increased facility for travel and transportation is the main object in the creation of railroads, and this it is which constitutes a railroad a public purpose. All other benefits, though belonging of right to the public, are simply incidental. When this facility is made absolutely free by the government (all persons having the right to use it), all will admit that it is then a public purpose, and such a public purpose as will support both the right of eminent domain and taxation. When it is absolutely free, except that the government demands and receives a compensation for its use, all will admit that it is still a public purpose, and such an one as will support both the right of eminent domain and taxation. When it is absolutely free, except that a railroad corporation receives the compensation instead of the government, though fixed by the government, all will admit that it is still a public purpose, and one that will support the right of eminent domain; but it is denied by the plaintiffs in error that it will still support the right of taxation. Why this distinction is made in favor of the right of eminent domain and against the right of taxation has never yet been shown and cannot be shown. If any distinction is to be made it should be (as we think we have heretofore shown) the other way—against the right of eminent domain and in favor of taxation. How is it that a railroad is so eminently a public purpose that the homestead, with all its endearments, may be taken from the owner, and himself and family, his wife and little children, driven out of doors, houseless and homeless, in order that the

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homestead may be converted into a roadway or depot, while at the same time the railroad partakes so little of a public character that one cent could not be levied as a tax to aid in its construction or operation? How is it that to take the homestead is constitutional and valid, and to be encouraged, while to take the one cent tax is unconstitutional, invalid, and an unwarrantable infringement upon private rights? Both are taken for the same purpose, to be applied to the same use, and to belong to and be controlled by the same corporation.

It is admitted that a railroad is a great public purpose, in one sense, because it adds vastly to the facilities for travel and transportation; but it is claimed that it is also a great private purpose, in another sense, because it adds vastly to the private wealth of a private corporation. All admit that the government may deal with the railroad in its public sense, until the government has exercised the right of eminent domain in favor of the railroad, but then it is claimed that the government must forever afterwards, and in all other cases, close its eyes upon the railroad as a public purpose, and see the railroad only in its private character. Is this logical? As a railroad is a public purpose in one sense, and a private purpose in another, who shall dictate to the government in which sense it shall regard the railroad, or in which sense it may deal with it? In the case of *Talbot v. Hudson*, 16 *Gray*, 423-425, the supreme court of Massachusetts use the following language: "The act is therefore in a certain sense for a private use, and inures directly to the individual advantage of such owners; but this is by no means a decisive test of its validity. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. . . . We are, therefore, to look further into the probable operation and effect of the statute in question, in order to ascertain whether some public interest or benefit may not be likely

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to accrue from the execution of the power conferred by it upon the defendants. If any such can be found then we are bound to suppose that the act was passed in order to effect it. We are not to judge of the wisdom or expediency of exercising the power to accomplish the object. The legislature are the sole and exclusive judges whether the exigency exists which calls on them to exercise their authority. . . . In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the declaration of rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community. It is on this principle that many of the statutes of this commonwealth by which private property has been heretofore taken and appropriated to a supposed public use are founded. Such legislation has the sanction of precedents coeval with the origin and adoption of the constitution, and the principle has been so often recognized and approved as legitimate and constitutional that it has become incorporated into our jurisprudence."

Many parallels have been drawn between railroads and various other kinds of business, for the purpose of showing that a railroad is a private purpose and therefore not entitled to receive public aid. Now, analogical reasoning does not always lead with unerring certainty to the right conclusion, and in this case it wholly fails. It has been suggested that the right of eminent domain may be exercised in favor of mills (or rather mill dams), bridges, ferries, &c., as well as in favor of railroads, and that the right of taxation cannot be exercised in favor of the former, and therefore it is inferred that

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taxation cannot be exercised in favor of railroads. Another glaring *non sequitur*. If it were true that mills, bridges, ferries, &c., could be aided by the exercise of the right of eminent domain, and not by taxation, it would not at all follow as a logical sequence that everything else which could be aided by the exercise of the right of eminent domain could not be aided by taxation. But even if such would follow, still the premises upon which this supposed argument is founded are false, and therefore the conclusion may also be false. If these were merely private mills, private bridges, and private ferries, neither the right of eminent domain nor the right of taxation could be exercised in their favor; but if they are public, or *quasi* public, as a railroad is public, then there can be no sufficient reason given why both the right of eminent domain and the right of taxation may not be exercised in their favor.

The supposed parallel between railroads and hotels, stage coaches, hacks, drays, &c., fails in more particulars than the parallel attempted to be drawn between railroads and mills, bridges, ferries, &c. The opening of hotels, the running of stage-coaches, hacks, drays, &c., has never been considered as incumbent upon governments. Governments have never undertaken to keep hotels, run stage-coaches, &c., and it has never been considered that there was any moral or legal obligations resting upon them to do so. But the duty of opening highways, canals, and other like improvements for the accommodation of travel and commerce, has always been considered most binding upon all governments. In favor of railroads and public mills, bridges and ferries, the right of eminent domain has always been exercised, but in favor of hotels, stage-coaches, hacks, and drays, never. But if hotels, stage-coaches, hacks, or drays, should ever become of such public importance as to authorize the exercise of the right of eminent domain in their favor, there can be no

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question but that the right of taxation might then also be exercised in their favor. It is also supposed that a parallel exists between railroads and physicians, printing establishments, and various other kinds of private business. Now the similarity between a railroad and a physician, or a railroad and a printing press, is not very striking or obvious, and what there is of resemblance is in the wrong place for the benefit of the inference to be drawn therefrom.

It will be noticed that all of the examples given to prove that a railroad cannot be aided by taxation are of a purely private character, and not one of them of a public or *quasi* public character, such as a railroad undoubtedly is. Now, in order to make the argument drawn from these examples of any value whatever, it must be shown that if these occupations referred to were made public, like a railroad, and subject to all the restraints of a railroad, still they could not be aided by taxation. This has not been shown, nor attempted to be shown. In fact it has not been shown nor attempted to be shown that all or any of these occupations mentioned are not already of a sufficient public character to be aided by taxation if the legislature should desire to do so. And again: If a perfect equality exists between railroads and all the different kinds of business and occupations, such as stage-coaches, hacks, drays, printing presses, physicians, &c., so that taxation cannot be exercised in favor of the one, unless it can also be exercised in favor of the other, then it must necessarily follow that the right of eminent domain cannot be exercised in favor of the one, unless it can also be exercised in favor of the other; for instance, that the right of eminent domain may be exercised in favor of stage-coaches, hacks, drays, printing-presses, physicians, &c., which is contrary to all opinion, or that it cannot be exercised in favor of railroads,

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which is equally opposed to all opinion. And suppose there is in fact, as is claimed, no distinction between railroads and stage-coaches, hacks, drays, &c., and that it is inconsistent and illogical for the law to make a distinction, will that absolutely prove that railroads cannot be aided by taxation? If inconsistency is all that is needed, why not say that stage-coaches, hacks, drays, &c., *may be aided by taxation*, and then the consistency would be perfect? But every lawyer knows that the law is not always consistent or logical. The men who make the laws are not always profound statesmen or logicians. Chief Justice COOLEY, in the recent Michigan case (*People v. Salem*, 20 *Mich.* 485), attempts to lay down a rule whereby we may know what may be aided by taxation and what may not. His language is as follows: "The term 'public purpose,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification to distinguish objects for which, according to *settled usage*, the government is to provide, from those which, by a like settled usage, are left to private inclination, interest, or liberality." See also *Cooley Const. Lim.* 533. If this rule is correct, the whole question depends upon what is the *settled usage*, and not upon any rules of consistency or logic. Now admitting, for the sake of the argument, that all the supposed parallels attempted to be drawn between railroads and other kinds of businesses are critically exact, and still it seems to us clear beyond all doubt that railroads must fall within the rule prescribed by Judge COOLEY, although the other kinds of business may not. Has it not been the settled usage in this country, for the last thirty years, to aid railroads by taxation? Are they not classed with the

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objects—the public purposes—for which the government will provide? There can be no doubt upon this question. It has been settled by an almost universal usage, and by a long list of judicial decisions, back to a time when this State was a wilderness, a part of the “Great American Desert,” that railroads may be aided by counties and municipal corporations; and if the law as thus settled is inconsistent or illogical it must so remain until amended by proper authority. If the law or the constitution has been so inconsistent and illogical as to take up one class of objects and aid foster them, and leave another class precisely like them unprovided for, the courts cannot so amend the law as to make it consistent and logical. That does not fall within the scope of judicial authority. But if the courts do attempt to so amend the law, will they *repeal* the law authorizing aid to railroads, or will they *amend* the law so as to give aid to stage coaches, hacks, drays, &c.? Either would make the law consistent. We do not admit, however, that there is any inconsistency in the law in this respect. On the contrary, we claim that there is a broad distinction between railroads and any other business of a purely private character.

We can suggest, however, a more exact parallel, a closer analogy, than any that has yet been suggested, and still it will not be claimed by the plaintiffs in error that it proves anything in their favor. Of all the different kinds of strictly private business that exist or may be imagined, that of a strictly private railroad corporation, such as we have heretofore supposed might be organized under the authority of the legislature, would come nearest in similitude to that of a *quasi* public railroad corporation, such as are actually organized; and yet the dissimilarity between the two corporations would be just great enough to destroy the desired inference sought to be drawn from their resemblance. We will admit that the strictly private corpo-

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ration would not be entitled to receive public aid, but that does not at all prove that the *quasi* public corporation would be in the same condition.

There has been a half expressed, half suppressed, claim that the right of eminent domain is not exercised in favor of railroad corporations because of their public character, but that it is exercised under the maxim, *Sic utere tuo ut alienum non laedas*. This is comic as well as novel. Because a man must so *use and enjoy* his own property as not to injure the rights of others, it is claimed that he must be totally deprived of its use, and must allow a *strictly private corporation* (as is claimed) to take possession of it, and use and enjoy it.

It is also claimed that the taxes must be duly apportioned, and the district taxed must have a special interest in, and be specially benefited by the thing for which the taxes are levied. This is admitted ; but still the government has a very broad and extensive discretion in the matter. The most that the legislature can do is to adopt the best rules within their power for the apportionment of the taxes. And these rules, however good, will sometimes be found to work injustice and hardship. No system has ever yet been devised, and the wisdom of man will probably never be able to devise, a system of apportionment that will do exact justice to every individual and to every locality. In cases of local improvements, or improvements that confer local benefits, the best system for securing the rights of the locality to be taxed that has yet been tried, is to let the locality itself say how much the benefit is worth, and therefore how much it is willing to be taxed for it. Under such a rule the locality taxed can certainly have no right to complain. This rule has been adopted in the present case, and the county of Leavenworth has declared how much she thinks the benefit is worth to her, and the amount for which she is willing to be taxed.

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In cities where street improvements are made, a street anywhere in the city is considered of such a public benefit to the whole city that the whole city may be taxed for any improvements made thereon. And it is also considered of such a special and local benefit to each individual owning property adjacent thereto, that he may be taxed for the entire cost of the improvements made in front of his own property. *Hoyt v. Saginaw*, 19 *Mich.* 39 ; *Hines v. Leavenworth*, 3 *Kas.* 186 ; *City of Leavenworth v. Mills*, 6 *Kas.* 288.

A railroad built anywhere in the State is a public benefit to the whole State, and upon the same principle as taxation for street improvements, in the absence of any constitutional restrictions, the whole State could be taxed for its construction ; and as each locality is also specially benefited by the improvement, there seems to be no good reason why it, instead of the State, should not be taxed to the extent of that benefit. Such has been the practice in nearly all the States of this Union. See the numerous decisions heretofore cited. On the continent of Europe, where railroads are generally constructed and owned by the government, we understand that both systems of taxation are considered legal. The whole State may be taxed to build the road, or the localities through which it is located may be taxed to build it. The question in this case is presented in its simplest form. It is not proposed to overrule, but to enforce the will of those to be affected. The road passes through the county proposed to be taxed, though it also passes beyond the limits of the county and through many other counties. The aid is not a donation, but it is a subscription to the stock of the road, giving to the county an interest in, and a share of, the control of the corporation. The tax is not imposed by others upon the county, nor by the county upon others than its members, nor by the county on a portion of its community ; but it is im-

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posed by the county on itself. In the case of *City of Aurora v. West*, 9 *Ind.* 74, 82, the supreme court of Indiana, speaking upon the point now under discussion, and the power of a city to aid a railroad extending beyond its limits, used the following language: "It is true the water works may benefit nobody but the citizens of the city, while the railroad may benefit the surrounding country to some extent; at the same time it confers a great local benefit on the city, one, perhaps, greater than the water works. But where such is the case, should the city be deprived of the right to benefit itself locally, because it cannot do so without also benefiting others? And if the argument is a good one that cities are necessarily incapable of aiding any improvement that may extend beyond the corporate limits, will it not apply with equal force to States? May it not be said that a State is created to govern within its territorial limits; and hence that it is unconstitutional for it to aid any work extending beyond those limits? That Indiana, therefore, could not aid in the construction of the Wabash and Erie canal, because it extended into Ohio; that she could not, with the consent of Ohio, construct that portion of the Whitewater canal lying in that State, because it was without her territorial limits; that South Carolina could not aid in the construction of a railroad to Memphis, in Tennessee, or to New Orleans, in Louisiana. But is this the doctrine? A *State* can do what its constitution does not, by positive provision or reasonable implication, prohibit. The United States and city corporations can do only what their constitutions permit. If the constitution of the United States expressly authorized the government to construct, with the consent of the States, roads within their limits, would there be any doubt of their power to do so? If a State, then, can construct by permission—if South Carolina can, with the consent of Tennessee, construct a road in

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that State—cannot a city of a State be authorized by the State to take stock in a road extending beyond her corporate limits?"

We have conceded that taxes can only be levied for a public purpose. But who is to determine what is a public purpose, or when the public exigencies require that a tax shall be levied, we have not discussed, and do not propose to discuss in this case. That it rests largely in the discretion of the legislature, and that the courts have but little to do with the question, we think must be clear beyond all doubt. Judge COOLEY says that "Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion, which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, or where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful. *Cooley Const. Lim.* pp. 129, 488. As to what is such a public benefit that it may be aided by the public, seems to be a question of public policy—of political economy, which must almost exclusively be determined by the legislature. And when the legislature have determined the question—when they have determined that a certain thing is of such great public benefit that it is public policy to aid it by taxation, if the courts may still say that such is not public policy, and for that reason declare the act of the legislature unconstitutional, the courts must possess almost despotic power. If such is correct doctrine, then there is an appeal from the legislature to the courts on mere questions of policy.

The ancient and venerable rule of *stare decisis* also

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requires that we should declare in favor of the power of the legislature to grant municipal aid to railroad companies. Twice this court has already so decided, and each time by a unanimous court. These decisions have been published by legal authority, and have become rules of property, and precedents for future decisions. In the first case, which was decided in 1864, the present Chief Justice delivered the opinion of the court. *Burnes v. Atchison*, 2 *Kas.* 454. In the second, which was decided in 1865, Chief Justice CROZIER delivered the opinion of the court. *Atchison v. Butcher*, 3 *Kas.* 104. Several other cases have been decided in this court, in which it seems to have been assumed without question that such acts were valid.

We might also state here, that not only the great weight of authority in the United States is in favor of the validity of such acts as the one we are now considering, but also the more recent decisions are likewise in favor of the validity of such acts. The Michigan case, already referred to, is the last decision against such validity, while the following cases, decided since the Michigan case, are in favor of their validity. *Stewart v. Supervisors of Polk Co.*, 30 *Iowa*, 9; *Langhorn v. Robinson*, 20 *Gratt.* 661; *Danville v. R. R. Co.*, 43 *Vermont*, 144; *Lafayette, Muncie & Bloomington R. R. Co. v. Geiger*, 34 *Ind.* 185; *King v. Wilson*, 3 *Chicago Legal News*, 137; 1 *Dill. Circ. Ct.* 555; *Stockton & Vasalia R. R. Co. v. Common Council of Stockton*, decided by the supreme court of California, May 12, 1871.

5. There are three other questions attempted to be raised in this case. *First.* It is claimed that a vote of the people of Leavenworth county on the question (in substance), whether the commissioners of said county should issue two hundred and fifty thousand dollars of the bonds of said county, to be expended in the stock of the Union Pacific Railway Company, Eastern Divi-

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sion, which was carried in the affirmative, was not sufficient to authorize the said commissioners to make said subscription and to issue said bonds, as they did, in payment therefor. We think it was. *Second.* It is claimed "that such bonds shall be issued only in payment of assessments made upon all the stock of such railroad company." This is admitted. And while it does not appear that any formal order was made upon the records of said railway company making any assessments, yet all the stock that was issued by the company, to any person or county, was full-paid stock. This answered substantially the requirements of the law. *Third.* It is claimed that the commissioners on the part of the county had done all they could do to pay this bond; and therefore that the county was not liable. The reverse of this is true, and therefore this question is not in the case.

The judgment of the court below is affirmed.

KINGMAN, Ch. J., concurred.

BREWER, J., did not sit in case (but see his *dissenting* opinion in the case next following, to wit, State, *ex rel.* St. Jos. & Denver City R. R. Co. *v.* Commissioners of Nemaha County).

THE STATE, *ex rel.* THE ST. JOSEPH AND
DENVER CITY RAILROAD CO., *v.* THE
COMMISSIONERS OF NEMAHA CO.

7 Kansas, 542.

Aid to railroads—*Validity of statutes.* The acts of the legislature of the State of Kansas authorizing counties and cities to subscribe

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for stock in railroad companies, and issue bonds in payment of the stock so subscribed for, are constitutional and valid. [Per VAL-
ENTINE, J., and KINGMAN, Ch. J., following Commissioners of
of Leavenworth Co. *v.* Miller, *ante*, p. 259.]

[BREWER, J., dissenting, files an opinion reviewing the question and
authorities, *post*, p. 327.]

Original proceedings in mandamus.

The principal question in this case was the same as that decided in the case of Commissioners of Leavenworth Co. *v.* Miller (*ante*, p. 259), namely, the constitutionality of chapter 12, Laws of 1865, authorizing cities and counties to subscribe to the capital stock of railroad corporations and issue bonds in payment of such subscriptions. The facts are as follows: On May 8, 1866, an election was held in Nemaha county, by order of the board of county commissioners, at which the qualified electors were authorized to vote upon the question whether the county of Nemaha should subscribe one hundred and twenty-five thousand dollars to the capital stock of the *St. Joseph & Denver City Railroad Co.* A majority of the votes cast were in favor of the proposition. On January 3, 1870, the board of county commissioners, pursuant to the authority given by said election, subscribed the said sum of one hundred and twenty-five thousand dollars to the stock of said company. The proposed route of said road designated in the notice for the election traversed Nemaha county, and it is conceded that said railroad has been constructed through said county. After making said subscription the county commissioners refused to issue the bonds of the county in payment thereof. The said railroad company filed a petition or relation in this court, in the name of *The State*, for a mandamus to compel the commissioners to issue the bonds of their county. The petition alleged—

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"That said *St. Joseph & Denver City Railroad Company*, the relator herein, has complied with each and all of the conditions upon which said subscription was made; and that after said conditions had all been so complied with by relator, said *Board of County Commissioners* refused to receive said stock, although the same was duly tendered to it by relator, and also refused to issue said bonds, or to levy any tax to pay the same, or the interest thereon, as required by the terms of said subscription." On filing the petition the relator moved for an *alternative writ* of mandamus, which motion was resisted by the defendants.

(References to authorities cited by counsel are very numerous, and being all cited in the opinion in the preceding case of *Commissioners of Leavenworth Co. v. Miller*, they are omitted from the briefs.)

Jeff. Chandler, for the relator.—1. The subscription made by defendants was made under and by virtue of an act of the legislature of the State of Kansas; which act at the time said subscription was made, was in full force and effect. *Laws of 1865*, 41. Said act is constitutional, as is shown by the following: 1st. Acts, in all material respects the same as the act in bar, have been sustained in nearly all of the supreme courts of the various States, as well as by the supreme court of the United States. 2nd. Before the court can declare said act unconstitutional, it must be shown to be a clear and palpable violation of some provision of the constitution of Kansas. A doubt is not sufficient. 3rd. It cannot be declared void merely because the court regard it as in conflict with natural justice. 4th. Nor can it be so adjudged on the ground that the tax which it provides for the payment of the bonds is not for a public purpose; as the legislature is the sole judge of this. 5th. Nor can it be contended with reason that

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said act is in conflict with that provision of the constitution of the State of Kansas which provides that the State cannot be a party to internal improvements.

2. The subscription of said stock by the defendant, and its promise to pay for the same in its bonds, is a contract with the relator, such as has been held by this court in the case of *Burnes v. City of Atchison*, 2 *Kas.* 454, is authorized by the laws of this State; and this court cannot by a later and subsequent decision impair the obligation of said contract made upon the faith of laws as expounded and construed by this court.

3. The board of county commissioners were exclusively authorized to determine whether the law was complied with; and having so determined, and made the subscription, they cannot now open that question.

And when the act is unconstitutional, if the subscription is in fact made, the county must pay. 9 *Ind.* 83; 32 *Pa. St.* 218, 229, 232, 235.

4. The expression "internal improvements," is technical in politics, and was adopted to indicate improvements made within the limits and jurisdiction of the States, and so claimed not to be in the power of the United States. It was never used to indicate improvements made by private persons or private corporations. On the contrary, this term originated and was used to apply to works done by the *public* alone, and for the *public*. See acts of Congress relating to internal improvements.

[*B. F. Stringfellow*, also for the relator, in support of the motion for a mandamus, filed an elaborate argument in favor of the validity of chapter 12, Laws of 1865, and reviewing at length the cases in 20 *Mich.* 452, and 25 *Wis.* 167, which decide adversely to the constitutionality of legislation authorizing municipal aid

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to railroads. His argument is too long to insert entire, and it cannot well be abbreviated.]

Clough & Wheat, and *J. E. Taylor*, for defendants.—1. It is not within the corporate powers of a county to subscribe to the capital stock of a railroad company, or to issue bonds of the county in payment, or in pursuance of such subscription, or to levy a tax to raise funds for the purpose of paying such bonds; and the several acts, and parts of acts, of the legislature of the State of Kansas which purport to authorize counties to subscribe to the capital stock of railroad corporations, and to tax private property to raise funds with which to pay for such stock, are *void*. 1 *Ohio St.* 86; 19 *Wis.* 624; 25 *Id.* 167; 57 *Pa. St.* 438; 20 *Mich.* 452.

So far as any matter material to this case is concerned, the House of Representatives and Senate of this State are only vested with *legislative* power by section 1, of article 2, of the constitution of this State. And we submit that the enactment of so much of chapter 12, Laws of 1865, and chapter 24, Laws of 1866, as authorizes counties to subscribe for the stock in a railroad, and issue bonds in payment thereof, is not, and was not, an exercise of *legislative* power.

2. By section 8 of article 11 of the constitution, the State is forbidden to be a party to the carrying on of any work of internal improvement. Whatever a county does under the laws of the State, it does as an instrument of the State. A railroad is an *internal* improvement within the meaning of said section 8, and not a *public* improvement within the meaning of section 5, of article 11 of our constitution. By force of those two sections, as well as from the nature of the case and the meaning of the words, there is an essential difference between *public* and *internal* improvements,

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recognized by the law of this State, and in general business throughout the country.

The railroad, if built, and the capital stock of the company owning it, is, and will be *private* (not *public*) property. Such railroad will not be for public use like a state-house or court-house, or public highways and bridges thereon, where all persons, at proper times and for proper purposes, may go without fee or reward, as the public use and convenience may require. But, on the contrary, a railroad is only to be used, and only intended to be used, when and as such use is to be fully paid for. The public have not, in any corporate or other capacity, any more right to use, or to the use of, a railroad, than any individual has to the use of conveyances of common carriers; and if not, how can the construction thereof, and the appropriation of property therefor, be for a *public* use.

3. The acts authorizing the subscription of stock, and issue of bonds, authorize *taxation* to pay said bonds. We submit the effect of said statutes is, if they are not void, to transfer the property of one person to another *without* compensation, which cannot be done by legislative enactment, even *with* compensation. Every person has a vested right to retain his own property for his own use, subject to the right of taxation for *public* use, and to the right of eminent domain, neither of which is called into requisition, so far as any question in this case is concerned. A party cannot be deprived of a vested right by legislative enactment.

Where the right of eminent domain stops, there the right to incur any obligation for the public ends. 1 *Ohio St.* 96; 2 *Kent Com.* 339, 407. The effect of the right of eminent domain against the individual "amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it." *Cooley on Const. Lim.* 559, note 4, and cases

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there cited. And therefore, an act permitting private property to be taken for public use, without requiring compensation to be made, and making *provision* therefor, is void. 4 *Ohio St.* 167, 494; 12 *Wis.* 213; 31 *Mo.* 181; 6 *Wis.* 605; 34 *Ill.* 203; 20 *La. Ann.* 497.

4. The relator claims that the defendants subscribed, on January 3, 1870, for one hundred and twenty-five thousand dollars, of its capital stock, in pursuance of an election held on May 8, 1866. This election was called, and the voting thereat was had, while chapter 12, Laws of 1865, and the amendatory act, chapter 24, Laws of 1866, were in force. The votes cast, election held, and orders of the board of commissioners of Nemaha county made, in 1866, did not, either themselves, or with any other matter alleged, (other than the pretended subscription relied on), constitute a contract, or render the county liable in any manner to any railroad company, or make it the duty of said county to subscribe to the capital stock of any company, or to issue any bonds of the county, or to levy any tax. See opinion of this court in the case of L. G. Railway & Trust Co. and U. P. Railway Co. v. Commissioners of Davis Co., 6 *Kas.* 256.

5. A party asking for a writ of mandamus, must show an obligation on the respondents to perform the act, and that the party asking for the writ is legally entitled to have such act performed. And also, that the party against whom the writ is asked to be issued, is in default in the performance of a legal duty. 3 *Kas.* 88; 25 *Me.* 333; 9 *Mich.* 328; *Moses on Mandamus*, 204.

BY THE COURT.—VALENTINE, J.—This is an application for a writ of mandamus brought originally in this court by the Saint Joseph and Denver City Railroad Company to compel the Board of County Commissioners of Nemaha county to issue one hundred and twenty-five thousand dollars of the bonds of said

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county to said railroad company in payment for a like amount of the capital stock of said railroad company for which it is alleged the county has already subscribed. Many important questions are involved in this case, one of which is the constitutional validity of an act of the legislature approved February 10, 1865, authorizing counties and cities to make such subscriptions, and to issue their bonds in payment therefor. *Laws of 1865, ch. 12, p. 41.* This question has been very ably argued on both sides, and if we err in our decision it is our own fault. Our decision is in the affirmative. We think the said act is constitutional and valid.

Before this case was argued or submitted to us, a case from Leavenworth county involving the same question was submitted (Board of County Commissioners of the County of Leavenworth v. Edward Miller, *ante*, p. 257); and since this case was submitted another case from Morris county supposed to involve the same question has been submitted: Morris v. Commissioners of Morris County, *post*. So far as the constitutional validity of said act, or of similar acts, is concerned, we have considered all of these three cases together; and we now render our decision in this case and in that of Commissioners of Leavenworth Co. v. Miller at the same time. In the case last mentioned we give our reasons at length for holding said chapter 12, Laws of 1865, to be valid, and it is not necessary to repeat them here. In this case we carefully refrain from expressing any opinion at this time upon the other questions involved. We shall reserve the consideration of such questions until the return of the alternative writ of mandamus, when an issue may be formed and the facts found, so that we may know the exact questions in the case.

The alternative writ is allowed.

KINGMAN, Ch. J., concurred.

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BREWER, J. [Dissenting.]—The preceding case of Commissioners of Leavenworth County v. Miller (*ante*, p. 259), was submitted to this court before I came upon the bench ; but before final decision thereof, and since I became a member of the court, the principal question in said case, which is also the principal question in this case, has been fully argued anew—both cases involving the constitutionality of the act of February 10, 1865, authorizing municipal aid to railroad corporations. While taking no part in the decision made in the case of Commissioners of Leavenworth Co. v. Miller, in which the principal opinion is filed, deciding this case as well as that (*ante*, p. 266), I am constrained to say that, upon the abstract questions involved in this case, I am unable to agree with my brethren.

Regarding the questions simply in the light of authority, it is useless to deny that the great weight is with them. The highest courts of most of the States have pronounced in favor of the validity of acts like the one in question, some upon one ground and some upon another. Some of the decisions are based upon reasons wholly inapplicable here. As for instance, in those States where it is held that because the State has power to build railroads, it can delegate to any municipality within it the like power, and authorize it to construct, either in whole or in part, such internal improvements. While I concede that the great weight of authorities—looking at it simply in the light of majorities—is with my brethren, yet there has ever been a vigorous and earnest dissenting. The question will not remain settled. Like Banquo's ghost, "it will not down." While the earlier cases do not discuss the question in the light of the principles upon which such legislative action must be based, there has been, ever since, great sheltering behind the accumulating authorities. "Whatever is, is right," is practically the idea upon which the late decisions rest. Because *so many*

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legislatures, *so many* executives, and *so many* courts have recognized this species of legislation, it must be valid. If that be the rule universally adopted, accumulating wrong will never be disturbed in its illegally acquired power.

But it is said that this question has already been settled in this court, and the maxim, *stare decisis*, is invoked in its behalf. I recognize the binding obligation of that maxim, and if the question had once been fully considered and determined in this court, I should have no desire to re-examine it. The feverish anxiety manifested throughout the State by the profession and the community, in reference to these pending cases, is evidence that they, at least, do not consider the question a settled one in this court. And before examining the question upon principle, let me look briefly at the cases heretofore decided by this tribunal, which have been claimed as precedents in this matter. *Burnes v. City of Atchison*, decided by this court in March, 1864, and reported in 2 *Kas.* 454, is the first case relied on as deciding, or at least affecting this question. The territorial legislature granted a charter to the city of Atchison. By section 80 thereof, the city was authorized to subscribe for stock in a railroad, and by section 31 to issue bonds in payment of such subscription. By section 11, the common council had authority to levy taxes not exceeding one per cent. The city subscribed stock and issued bonds. In 1859 the council levied a tax of one per cent. for general revenue, and also one per cent. for payment of interest on bonds issued. An injunction suit was brought to restrain the collection of these taxes. This court decided that there was a plain and adequate remedy at law, and that, therefore, injunction would not lie. So far the decision is authority, and no farther. The opinion of the court, as given by Mr. Justice KINGMAN, went beyond this, and declared that the tax

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for payment of the interest on the railroad bonds was void, as the full power granted in the charter had been exhausted in the levy for general revenue ; and going still a step beyond, declared, that though the tax was void, the bonds were valid. This, which was purely an *obiter dictum*, being a second degree removed from the point decided, can hardly be considered as an authoritative ruling by this court to be followed on the maxim of *stare decisis*. But again—for this consideration may seem technical where a grave constitutional question is up for determination—the opinion expressed by Mr. Justice KINGHAM as to the validity of those bonds, may have been correct, and yet throw no light upon the question we have to decide. The territorial legislature granted the charter which authorized the subscription. The powers of that legislature were not derived by grant from the people of the territory, nor restricted by any constitutional limitations other than those contained in the federal constitution, and were, therefore, in this direction, unlimited. This is the reason given by the learned justice for declaring the bonds valid. It is a reason supported by authority. Chancellor KENT, in his Commentaries, vol. 1, p. 384, says that “the general sovereignty existing in the government of the United States over its territories is founded on the constitution, which declares that Congress ‘should have power to dispose of and make all needful rules and regulations respecting the territories or other property belonging to the United States.’” And again: “It would seem from these various congressional regulations of the territories belonging to the United States, that Congress has supreme power in the government of them, depending on the exercise of their sound discretion.” And further along, after speaking of the project of colonizing the uninhabited region lying west of the Rocky Mountains, he uses this language: “It would be a long time before it

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would be populous enough to be created into one or more independent States; and in the mean time, upon the doctrine taught by the acts of Congress, and even by the judicial decisions of the supreme court, the colonists would be in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and parliament of Great Britain if they could have sustained their claim to bind us in all cases whatsoever."

The failure of the distinguished chancellor as a prophet, in nowise detracts from his reputation as a jurist. His opinion as to the unlimited power of Congress over the territories, is sustained by judicial decisions. It was delegated by the organic act to the territorial legislature. The absence of any constitutional restrictions on this power, was the reason given by the learned justice for sustaining the validity of those bonds. 2 *Kas.* 485, 486.* But this reason contains the very question we have here to decide. The power of the legislature is no longer unlimited or indefinite. The people, with whom rests the complete sovereignty, have adopted an organic instrument, a State constitution, which creates legislature, courts, and executive, and fixes and determines what powers each may exercise. They have thus created constitutional limitations.

[* In *Burnes v. City of Atchison*, 2 *Kas.* 454, Mr. Justice KINGMAN, in his opinion (pp. 484, 485), quotes section 24 of the Organic Act, and then says: "This provision conferred upon 'the Territory all the legislative power of a State government, *unrestricted by its constitution* except in the particulars above stated.'" And on p. 486, he says: "We have already seen that the (Territorial) legislature which passed the charter in question (Private Laws of 1858, ch. 77, p. 172), *was invested with all the powers of a State legislature without any constitutional restriction affecting the question under consideration*" (that is, the question of the authority of the City of Atchison, under sections 80, 81, of the city charters, to subscribe for stock in a railroad company and issue bonds in payment of such subscription).—REPORTER.]

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How far do these constitutional limitations affect the assumed power? That is the present question—a question which could not arise in the former case, because the bonds were issued before these constitutional limitations were imposed. The case of *Butcher v. City of Atchison*, 3 *Kas.* 104, arose upon similar bonds, and is subject to the same criticism.

The case of *State ex rel. Hurd v. Mayor, &c. of Leavenworth*, which was before this court in 1868, went off in this way: An alternate writ was granted, commanding the city to show cause why a mandamus should not issue, compelling it to levy a tax for the payment of coupons of a railroad bond issued by it. The city made answer, that not desiring to contest the matter with the relator, it had, since the issue of the writ, tendered him the full amount of the coupons. This answer was, for some reason which the record does not show, stricken out, and leave given to file another. No other answer was filed, and no other proceedings or orders were had in the case. No opinion was ever filed. It seems to me the most strenuous advocate of the validity of these bonds would hardly call this a precedent, and binding upon this court.

The way being then, as I conceive, fairly open for an examination of this question upon principle, upon what, let me inquire, must such legislative action rest for support? I propose to look at it entirely as a new question, and unembarrassed by prior adjudications, here or elsewhere. I feel more free to examine it in this manner, for the reason that my opinion, as it differs from that of the majority of the court, carries with it no authority.

All power resides with the people. The ultimate sovereignty is with them. The constitution is the instrument by which some portion of that power is granted to different departments of the government.

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Power is not inherent in the government, from which some portion is withdrawn by the constitution. The object of the constitution of a free government is to grant, not to withdraw, power. This is the primal distinction between the constitutions of the old monarchical governments of Europe, and those of this country. The former indicate the amount of power which the people have been enabled to withdraw from the government; ours the amount of power the people have granted to the government. I know it is common in making the distinction between the federal and State governments, to speak of the former as a government of enumerated or delegated powers, and of the latter as one of non-enumerated or general powers. The distinction is obvious; the language appropriate. It helps to make prominent and clear the limited sphere in which the federal authorities may rightfully act. But though the State government is not one of enumerated and specific powers—that is to say, the legislature is not, by the terms of the constitution, empowered to legislate upon certain named and specific matters only, it is nevertheless a government of granted powers. The constitution creates legislature, courts, and executive. It defines their limits, grants their powers. It should always be construed as a grant. The habit of regarding the legislature *as inherently omnipotent*, and looking to see what express restrictions the constitution has placed upon its action, is dangerous, and tends to error. Rather regarding first those essential truths, those axioms of civil and political liberty upon which all free governments are founded, and secondly those statements of principles in the bill of rights upon which this governmental structure is reared, we may properly then inquire what powers the words of the constitution, the terms of the grant, convey. It is true, many of the provisions of the bill of rights are so limited in their scope, so certain, clear, and well-defined, that

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their full force is easily understood and applied without difficulty, whether we consider them as restrictions upon inherent, or conditions of granted power. Such is section 16: "No person shall be imprisoned for debt except in case of fraud." The full extent of this provision is tangible, definable. It reaches to a single ill. Full effect can be given to it without difficulty. But there are provisions which are not so limited, certain, and definite. Such are section 1: "All men are possessed of equal and unalienable natural rights, among which are life, liberty, and the pursuit of happiness;" and the first sentence of section 2: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Looking at these simply as limitations upon existing power, as restrictions upon an otherwise absolute supremacy in the legislature, and they seem little more than "glittering generalities." But when we regard them as the conditions upon which legislative power is granted—as the foundation principles upon which all legislative action must be based, and a disregard of which renders such action void, they become substantial, prominent, and vital. The very first condition of legislative action is, that such action shall be for the equal benefit and protection of the people. Impartiality must be the unvarying rule. True, it is not possible that all legislation should, in its results, operate equally upon all classes and industries. Revenue must be collected, and human skill has not yet been able to devise a system by which its burdens shall be thrown with mathematical exactness upon every person and all property. Keen, sharp-sighted men, watching all points, often adjust their business to take advantage of these unforeseen or apparently unavoidable inequalities of legislation, so as to make large profits off from the less watchful public. But this is an evil incident to the imperfections of all human

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action, and is very different, fundamentally different, from that which exists in that legislation whose apparent object and manifest result is to add wealth to the few by taking it from the many, or to give by law to one man that which another has gained by labor. I cannot do better than to quote the forcible language of Mr. Justice RANNEY, in his dissenting opinion in *Cass v. Dillon*, 2 *Ohio St.* 628: "First among them in order, and first also in importance, is the great political truth that sovereignty belongs only to the mass of the community; or as expressed in the bill of rights, 'all political power is inherent in the people.' In extended communities, for obvious reasons, the direct exercise of this power becomes impracticable, and this has led to an institution of a subordinate agency called the government, entrusted for the time being with the exercise of such sovereign power, and such only, as is clearly expressed in the instrument of delegation—the constitution. This seems very plain, almost too plain, to need this formal statement; and yet it is forgotten or disregarded as often as the argument is advanced that a legislative act can only be treated as inoperative when expressly prohibited by some clause or section of the constitution. The question can never be, What might the people, the source of sovereign power, have done or authorized to be done in their name and behalf? but, *What have they authorized to be done?* As well might any other agent acting under written instructions claim to be authorized by his principal to do whatever he was not expressly prohibited from doing, however foreign it might be to the power actually conferred. Hence this court has held that it is always legitimate to insist that a legislative enactment, drawn in question, is invalid, either *because it does not fall within the general grant of power* to that body, or because it is prohibited by some provision of the constitution; and if the former is made to appear, it is as

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clearly void as though expressly prohibited." 1 *Ohio St.* 86.

Add to this the idea that the general principles enunciated in the bill of rights are the conditions upon which power to make laws is granted to the legislature, and we have rules by which to determine the constitutionality of a law. Let us apply these rules to the question before us. And at the outset, it is worthy of remark that, inasmuch as these laws operate to take money away from the citizen—taken, it is true, in the way of taxes, but then it takes money to pay taxes—they who assert their validity should show warrant for them. The taxing power is relied on to sustain these bonds. Payment of both interest and principal is secured by means of taxes, and this is made the pivotal fact upon which to rest their validity. The power of taxation is a legislative power, and by the grant in the constitution, vested in the legislature. When and to what extent this power shall be exercised is committed to its discretion. Having exercised that discretion there is no appellate or revisory power in the courts to re-examine the question. Discretion is not the subject of review. The only limitations are in the manner of the apportionment, and that it be for a public purpose. Chief Justice MARSHALL, in *McCullough v. Maryland*, 4 *Wheat.* 428, says: "The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the government acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government the right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limit to the exercise of the right, resting confidently on the interest of the legislature and the influence of the constituents over their

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representatives, to guard them against its abuse." If it were true that the influence of the constituent over the representative was sufficient security against abuse, it would be the only unlimited power that is thus safe. This language of MARSHALL, Ch. J., is quoted frequently, and the idea it conveys pressed with exceeding force in many of the opinions pronounced upon this question. There is a sense in which it is correct, and another in which it is not. The power of the legislature is not restricted as to the *amount* of the levy; it is as to the *object*. In regard to the former, it has a discretion which is not the subject of judicial review; its decision is final. Whether the general levy for a current year shall be three mills or three cents, is a matter into which the courts may not inquire. No matter how clearly it may appear that the levy is inadequate to supply the legitimate demands on the public treasury, or to furnish the means for the appropriations made; or on the other hand that the levy will not merely pay all the appropriations and supply all possible demands, but also fill the vaults of the treasury with idle millions, while it bankrupts the tax-payer, there is, nevertheless, no scope for the interference of judicial power. Nor will the validity of the tax be affected, or the door opened to judicial inquiry as to its validity, by the fact that some of the appropriations the legislature has made, or may make, are for purposes which the State may not seek. State taxes are collected ordinarily, by virtue of an act levying a certain number of mills on the dollar for general revenue. Appropriations are made by other and distinct acts. Now, in such cases, there is no such relation between the levy and the appropriation that the mistakes of the latter can affect the validity of the former. The courts cannot restrict the legislature from levying taxes, because they see it has, or fear it will, squander the funds of the public

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treasury. To illustrate: The last legislature passed an act levying three and five-sixths mills on the dollar for general revenue. The State is by the constitution forbidden to be a party to any works of internal improvement. Suppose the same legislature had passed an act appropriating one hundred thousand dollars for the construction of a canal from Lawrence to Topeka. This act would, without question be unconstitutional and void. But its unconstitutionality would in no manner affect the validity of the general tax law referred to. The courts would have no power to reduce the levy, nor forbid its collection. The legislature has power to levy taxes for general purposes. Having such power, its determination as to the amount of the levy is final, and beyond investigation. In this sense, the quotation from MARSHALL, Ch. J., correctly states the law. But where the relation between the levy and the appropriation, the tax and its object, is made specific and certain, then a different rule prevails—the determination of the legislature is not final. The influence of the constituent over his representative is not the only restriction. Courts may inquire, and where the appropriation is one the object of which the government may not rightly pursue, they may strike not merely at the appropriation, but also at the tax. To pursue the illustration just used: Suppose the legislature had passed an act appropriating one hundred thousand dollars to construct a canal from Lawrence to Topeka, and levying a tax of one mill on the dollar to raise such amount. Here the relation between the levy and the appropriation, the tax and the object sought, is obvious, specific, and certain. The unlimited power of the legislature over taxation would not uphold the appropriation, or even the tax; but the unconstitutionality of the appropriation would destroy both it and the tax. Probably the difference between

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the two cases is less a difference of principle than of application. The power of taxation is limited by the end sought to be accomplished. Taxation is never the end for which government acts; it is only the means used to accomplish some end. In order to determine the validity of any act, the primary inquiry should be directed to the end sought, not the means used. Undue prominence has been given in the discussions upon these bond questions to the power of the legislature over the means of taxation. If the end is one which government may rightly seek, and the means used not forbidden, the act is valid. If, on the contrary, the end is one which government may not rightly pursue, it matters not what means are used, the act is void. This distinction is considered by the supreme court of the United States in *McCullough v. Maryland*, 4 *Wheat.* 316, and *Osborn v. United States Bank*, 9 *Id.* 859. In these cases the power of Congress to incorporate the United States Bank was sustained, and upon this ground: The power to create corporations is not, in terms, granted by the constitution to Congress; but as Chief Justice MARSHALL held, the creation of a corporation is a means, not an end. The end sought was the collection and transmission of the revenues and funds of the government. The means used was the bank. The end was one the government might rightfully pursue. The means were not forbidden. Therefore, the act was valid. But if there had been simply the charter of a bank for the transaction of private business, and without any reference to the collection and transmission of the public revenue and funds, it was conceded such a charter would be void as beyond the powers of Congress. Yet in both cases the chartering of the bank—the mere act of creating a corporation—was the same. The end to be accomplished rendered one valid; the other void. Just so is it in the case before us. The

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mere fact that the means used, taxation, is a legislative power, and is vested in the legislature, helps but little in the determination of this question. The main inquiry is, what is the end sought? The concessions which most supporters of the legislative power, as respects taxation, make, that it must be for a public purpose, is, when rightly considered, a recognition of the principles I have been asserting. For the machinery employed, the means used, the mere levying and collecting of the tax, is the same, whether the money thus raised is to be used in building a state-house or private residences. What is the end sought, what is the manifest object and effect of these laws? Taxation simply places the money in the public treasury. Its power goes no further. The appropriation of the money discloses the end and object. That end is the use of the public moneys to build one private industry. It takes money which comes from and belongs to all, for the capital of the business of the few. It takes public funds to build railroads, which, when built, belong to private individuals, and are managed for purposes of private gain. A. and B. desire to build a railroad between two points, but have not sufficient means. It is both pleasant and profitable, they imagine, to be the proprietors of a railroad. Ordinarily, when men think of embarking their capital in any enterprise, and have not means sufficient to carry it through, they seek the co-operation of other men with capital, till enough means are secured; or, failing to secure that, abandon the undertaking. But building railroads is done in a different way. The counties, cities, and towns touched, or whose interests may be supposed to be affected by the proposed road, are induced to issue bonds to furnish the needed capital. A. and B., or the corporation which they have formed, receive the bonds, sell them, and out of the proceeds, with such capital as they have, or can raise by mortgages, build the road. Thus an

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important business is commenced. A great industry is built up. But how? By the capital mainly furnished by the people of those municipalities. Take out of this transaction the means used to accomplish the end sought, the machinery of taxation (and henceforward through this argument I shall consider the question independent of the matter of taxation), and pass a law to accomplish that end directly, and what would it be? Simply this, *a law that every citizen in those municipalities should take a certain proportion of the money and property he has, by his own labors, been able to accumulate, and pass it over to A. and B. and their corporation, to help the latter build their own road.* Power to enforce a contribution like this is not limited by the amount demanded. If the legislature has power to enforce a contribution of one dollar upon each individual, it has of one thousand dollars. Amounts never make principles. Now, how can a law be considered as based upon "equal protection and benefit" which takes *from all the citizens* the means for starting *one* person or corporation in business.

But it may be said that while a law authorizing a donation of bonds is open to this objection, a law like the one before us, which simply provides for the issue of bonds *in payment for stock*, is not. For it is said, "The people receive an equivalent for their money, in the same manner that they do when they pay for brick or stone to build a court-house, or when they pay salaries to judges or other officials. Nothing is given. It is a mere question of purchase and sale. The municipality becomes a stockholder upon the same terms and with the same rights and privileges as other stockholders. It will receive its share of the profits. It always does." This, it is true, may, in theory at least, be a good answer to the objection just made to the validity of municipal aid to railroad corporations in cases where stock is issued for the bonds, but only in

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such cases. These cases are, however, open to another serious objection. That personal independence which we understand to be the unquestioned right of every citizen of a free government, that "pursuit of happiness" which is the guaranteed right of our constitution, gives to every one, among other things, the right to pursue such avocation, and to employ one's means in such business as personal choice shall dictate. The legislature may not say to one, you must be a merchant; to another, you must enter a professional life; to this one, you must be a ditch digger or a hod carrier; and to that one, you must be a farmer. The choice of occupation is beyond legislative power. No more can it say to one, you must invest your means in a manufactory; to another, in a hotel; to a third, in mercantile business, and so on. A citizen has the uncontrollable right to invest his means in any business he chooses, not *malum in se* nor *malum prohibitum*. Now a law which compels a citizen to invest his means, whether little or much, part or all, in a railroad enterprise, even though it secure to him his share in the profits of that enterprise, trespasses on this right. It will not do to say that a railroad is a public benefit, therefore it is a public benefit which is sought, and therefore public funds may be used. Public benefit will not of itself support an appropriation of public moneys. If it did, no man's property would be safe. For there is no honorable private enterprise which is not also a public benefit. There is something more than poetic fancy in the saying, "Whoever makes two blades of grass to grow where there was but one before is a public benefactor." It is sober prose and literal truth that every one who by his industry adds to the sum of those things which contribute to human prosperity and happiness, confers a public benefit. The interlacings of society are so varied and far-reaching that, by a universal law, the prosperity of one con-

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tributes to the welfare of all ; the building up of one industry is a blessing and benefit to all. Public benefit by no means implies public purpose or public use. A mere private purpose in a private enterprise, and for private use, oftentimes results in a far wider and greater public benefit than a public purpose seeking public use through public agents. A. T. Stewart, in building up his colossal mercantile business, has conferred a greater public benefit on New York than many of the purely public enterprises of the city. That great public benefits result from the building of a railroad, no one will question. So they do from the running of a line of steamboats, the building of a hotel, the erection of a manufactory, the establishment of a daily newspaper. It is also true that the larger the work, the greater the public benefit. A great thoroughfare, like the Kansas Pacific, is more a public benefit than a short line, such as the Leavenworth and Atchison railroad. A like difference exists between the Metropolitan Hotel, of New York, and a country tavern—between the New York *Daily Tribune*, and one of our local papers. But questions of delegated power are not determined by amount of probable benefits. If the legislature has power to appropriate the public funds to the larger work, it has to the smaller, and every work or industry which the passion or whim of a sitting legislature may choose to aid, may be thrown as a burden for years upon any community, because every one carries with it some measure of benefit to the public.

Public purposes and public uses will justify an appropriation of the public funds, and it is claimed that a railroad is a public highway, and therefore subserves the public use. It is difficult to see in what just sense a railroad can be said to be a public highway. It is not public in the sense that the ownership of the highway, and other property appertaining to the rail-

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way, is in the public. Both the road and the appointments are private property. All are subject to taxation. No deduction is ever made on the ground that it is in whole or in part public property. The road-bed and right of way are not open to the use of the public. The company may fence its right of way, and remove therefrom any of the community (though the money, in the shape of taxes, has paid in part for his road), as a trespasser. Cattle straying on the track are trespassing, and the company killing them is liable only for gross negligence. *U. P. R. W. Co. v. Rollins*, 5 *Kas.* 167. Every man can go upon a public highway in any manner his pleasure may dictate.

But it may be said the railroad is a peculiar kind of highway, designed for the use of only a particular kind of vehicle. Granted. But the community may not use that highway with that vehicle. Only the corporation owning the track has the right to place any vehicles upon it. The Atchison, Topeka & Santa Fe railroad company cannot, without permission, run their cars and engines upon the track of the Kansas Pacific road. And so universally. The use of a railroad is limited not only to the kind of a vehicle for which it is designed, but to the vehicles of the company which owns the road. It might perhaps be said that a highway which is limited to the use of a particular kind of vehicle, and free to all having such vehicles, was a public highway; but when the highway is limited to one kind of vehicle and to the use of one corporation or individual, it seems wondrous hard to call it a public highway. But the community have a right to travel and have their goods transported in the cars which the company runs upon its track. But this is incident to the business the corporation is engaged in, no matter in what manner that business is carried on. Whoever engages in business as a common carrier, must hold his carriages open

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to all. This is true of all common carriers, and is not a peculiar feature of railroads. Steamboats, stages, expresses, are free to all. So also are teams, drays, hacks and omnibusses, when used as common carriers. It is also true in other cases of bailment. If the railroad companies should take their engines and cars and run them on the public roads—and that steam may be used as a means of propelling vehicles on those roads ere long, is by no means improbable—engaging in the business of common carriers, they would still be compelled to receive all who chose to ride. Can it be that that which has been ever the incident to the business of a common carrier, is sufficient, in these late days, to change, in favor of one common carrier, a private employment into a public use? Should a stage coach company find it for their advantage to purchase a separate road between two cities for the exclusive use of their own coaches, would such a road, in any just sense, be a public highway? Is not the parallel perfect? The business of the stage coach, like that of the railroad company, is that of a common carrier, and therefore each must transport all who desire. Each has a separate road which it owns, and each occupies the same exclusively, with vehicles. Where is the difference?

But the question arises, what is a public use? Wherein does it differ from a private use? What elements are there which, entering in, assign a use to one or the other class? A surface answer would be that whatever all may use, must be a public use, and that that which only an individual or a class may use, must be a private use. For ordinary purposes these definitions are sufficient, yet a careful examination will show that they are neither exact nor discriminating. For there are many things which all may use, that are not properly classified under the legal term, public uses. Such are hotels, stages, expresses, theaters, circuses,

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and places of amusement generally. These, whoever desires and tenders the ordinary fee, may use. Yet no one would call these public uses, and some of them many would hardly call public benefits. On the other hand, the executive mansion is free only to the governor, who may use and control it without permitting any other member of the community to enter. True, before every man is the possibility of becoming governor; but a whole sex is disbarred. Yet who doubts that this is a public use. The terms "public" and "private" do not refer to the amount of use. There is something back of this which distinguishes. Let me suggest two or three rules of distinction between the two classes of uses. And first, whenever any use is founded upon an interest which is individual property, the subject of sale, gift, devise, and bequest, that use must be classed as private. With many public uses are connected interests in individuals, which are valuable to them, and perhaps not inappropriately called their property. Such interests have all public officers, all in public trusts, and in charge of public parks, ways and buildings. The extent of their interests, the compensation they receive, the benefits they enjoy, may and often do vary with the amount of the use. They may last for a term of years, indefinitely, or even for life. But no matter how valuable or how lasting, they are ever personal, and can neither be sold, given away, devised, nor bequeathed. They lack, therefore, these essential elements of absolute property. They are rather concomitants of, incidents to, the use, than bases for it. The interests are for the benefit of the use; not the use for the benefit of the interests. Their existence in no sense changes the nature of the use from public to private. But where the use is based upon an absolute property-interest in an individual, and is for the benefit of that interest, it is fairly and legally classed as a private use. Take a hotel for example.

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Private capital builds it — when built it is private property. The thing used belongs absolutely to an individual. Though charge is made for its use, yet all may use it. It is public in the sense that every one tendering the ordinary fee has a right to its use. It is not open to A. and closed to B., free to one class and barred to another. Yet no one would hesitate to call that a private use, for it is founded upon an absolute property-interest in an individual, and the profits of it flow into a private purse. Here it may be remarked that the exacting of compensation, by itself considered, throws little light on the question. It is competent for the authorities to demand pay for the use of almost all public property. An admission fee to a public library, public museum, or a toll upon a public road, may lawfully be charged. And on the other hand, the owner of a private bank or a private library does not render them public by permitting the public to enter and use them without pay. But when we look beyond the mere receipt of the compensation to the purpose for which it is received, and the direction it takes after receipt, we find an important test. If the compensation is received simply for the purpose of keeping and improving that which is used, and any surplus is to go into the public treasury to diminish the public burdens, the inference is strong that there is a public use. But if the compensation is exacted with a view to the benefit of a private individual, and the surplus above what is needed for the maintenance of the thing used is to go into a private pocket, the conclusion is irresistible that there exists simply a private use. Again: the right to terminate the use may help to discriminate between private and public uses. If an individual can dictate whether and when the use shall cease, it is a use which exists by his sufferance, and no matter how willing and anxious he may be for all the members of the community to enjoy it, we may

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well consider it as only a private use. But if the use is not only free to all, but continues at the will of the public, we may properly class it as a public use. Not unfrequently the owners of fine gardens, or choice collections of paintings, open their grounds or galleries to the public; but no one would dream of calling these public uses and levying taxes for the benefit of the owners, for they have the right at any time to terminate such free use. Tried by either of these tests—and doubtless more might be suggested—a railroad owned by a private corporation is a private use. It is founded upon an absolute property-interest in an individual. The corporation owns everything. The interest it possesses has all the attributes of absolute property. The corporators may sell, lease, give away, and bequeath it. Even the use, which in one sense, is free to all, is free to the owners in a sense different from that which it is to others. They use it without charge, by right; others, by grace. Again: the tolls exacted over and above the amount necessary for the maintenance of the road, go into the pockets of the individual owners. No matter how large these profits, no portion goes into the public treasury. The purpose of the builders the object of the work, is private profit, individual gain. And again, the corporators can determine whether and when the road shall be given up, the use shall cease. They may sell the rolling stock, take up the ties and iron, and dispose of them, and release the right of way to the original owners, and no one has power to stop them. The public, which has used it, may desire still to use it, but is at the mercy of the corporation. Yet such a road is classed among "public" uses!

But it is said that it is the duty of the government to furnish means of communication from one part of the State to another; that in discharging this duty, it is not limited to the old-fashioned dirt road, but may

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make use of the modern appliances for facilitating such communication, and that if individuals take this duty off its hands, it may properly, out of the public funds, assist these individuals in discharging that duty. It is singular evidence of the existence of this duty that the people of Kansas, in framing their constitution, forbade the State to discharge it. Article XI. section 8: "The State shall never be a party in carrying on any works of internal improvement." But the argument is not good, even if the premises were true. It does not follow because a State may do a certain work as a public improvement, and for the public use, that it can give of the public funds to a private individual, to enable him to do a like work as a private speculation and for personal gain. And this, notwithstanding the general convenience of the community is promoted in the one case equally with the other. For in the one case the public owns it; the public controls it; it is public. In the other, the individual owns it; the individual controls it; it is private.

Again: it is said that the right of eminent domain is exercised in behalf of railroads, and that, by virtue thereof, the owner of real estate is compelled, against his will, to surrender it to a railroad corporation for the use of its track; that the sacredness of private property, that "equal protection" secures to each the free enjoyment of his property, subject only to the paramount demands of a public use. The argument, therefore, is, compactly stated, thus: If private property can only be taken for public use, and can be taken for the use of a railroad, the use of a railroad is a public use, and its highway is a public highway. Public use upholds taxation—therefore, taxation in aid of railroads is valid. The great advantage of this argument is that it bridges over the question, *What is a public use?* That underlying question, whose answer determines the whole case, is conveniently avoided.

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The reverse argument would be equally logical, and the right of eminent domain in favor of railroads supported, because of the exercise of taxation in their favor. The rightfulness of each is proved by the existence of the other, without inquiry into the principles upon which either is based. These rights are not identical. On the contrary they are, in their nature, intrinsically different. The one is simply the power which the government has to compel a single citizen, under some circumstances, to sell his property. The other is the power of compelling all citizens to contribute to the support of the government. The first does not affect the amount of one's property; it simply changes its form. The other diminishes the sum of one's wealth. In the one case the citizen sells his land, and receives its full value in money. In the other he pays his money, and receives nothing except the incidental blessings which the continuance of the government affords. Selling land, he receives that with which he can buy land elsewhere, or purchase food and clothing. Paying taxes, he receives nothing with which he can make purchases or secure support. It is evident the former is a much less trespass on the sacredness of private property than the other. It is less grievous to compel a man to sell than to give to a railroad. It is true the power of eminent domain is less frequently invoked than that of taxation. But frequency of use, and consequent familiarity with, does not determine the grade of power. Now, rights which are so distinct in their nature, so different in their operation and effect, can hardly be founded upon the same principles, or based upon the same necessities. Some elements must enter in, in the one case, which do not exist in the other. But it is claimed eminent domain is the higher right, and therefore its existence demonstrates the existence of the lesser—taxation. But if taxation be, as I have attempted to show, the higher right, this argument fails. Again:

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we levy taxes for many objects for which the right of eminent domain would hardly be claimed. In *Whiting v. Sheboygan Railway Co.*, 25 *Wis.* 167, Chief Justice DIXON says: "Taxes may be levied to build a State capitol, court-house, public school buildings, jails, a State prison, an asylum for the insane, &c.; but recourse to the power of eminent domain to obtain the land upon which to erect such building, would be something new in the legislative and judiciary proceedings of this country." And in *West River Bridge Co. v. Dix*, 6 *How.* 546, WOODBURY, J., uses this language: "Who ever heard of laws to condemn private property for public use, for a marine hospital, or State prison? So a custom-house is a public use for the general government, and a court-house or a jail for a State. But it would be found difficult to find precedent or argument to justify taking private property without consent to erect them on, though appropriate for the purpose." Who would sustain a law seizing and condemning my neighbor's house to public use for an executive mansion, even though it provided full compensation? Yet taxation would be sustained to secure such an object. These many instances in which private property cannot be taken for public use, by virtue of the power of eminent domain, naturally suggest an inquiry as to the correctness of the definition ordinarily given of that power. It is not the right to take private property for public use, as it is ordinarily defined, because in many instances private property cannot be taken for public use, though the full power of eminent domain unquestionably exists in the government. Definitions are the most difficult things in the world to frame, and when framed, dangerous to base arguments upon. But it is evident, from the language used by many jurists, that the power is not limited to cases of public use, but may be invoked in behalf of public benefit. COOLEY, in his work on Constitutional Limitations, p. 524, defines it

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thus: "More accurately, it is the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature, which pertain to its citizens in common, and to appropriate and *control* individual property for public *benefit*, as the public safety, necessity, convenience, or welfare may demand."

Chancellor WALWORTH, 3 *Paige*, 73, says: "This right of resumption may be exercised, not only where the safety, but also where the interest, or even the expediency of the State, is concerned. If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the *benefit* to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain."

"In all such cases the object of the legislative grant of power is the *public benefit* derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of *individual enterprise*." Wood, J., in *Buckingham v. Smith*, 10 *Ohio*, 296, uses this language: "The principle is founded on the superior claims of a whole community over an individual citizen; but then in these cases only where private property is wanted for *public use*, or demanded by the *public welfare*." In *Fletcher v. Peck*, 6 *Cranch*, 145, JOHNSON, J., says: "It amounts to nothing more than a power to oblige him to sell and convey when the public necessities require it." These quotations might be extended, but enough have been made to show that the benefit resulting to the public from a private enterprise, has been considered by eminent jurists sufficient bases to sustain the exercise of eminent domain in its behalf. Whether this be well or ill-founded, if it be the basis upon which eminent domain, in behalf of private enterprises, has been sustained, the argument, from the exercise of

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eminent domain to the right of taxation, falls to the ground, for it is agreed taxation can only be for public purposes, and where the public use is subserved.

Mr. Justice COOLEY, in the *Detroit & Howell Railroad v. Town of Salem*, 20 *Mich.* 452, makes a strong and plausible argument to show that the power of eminent domain is more akin to the police power, than to that of taxation. It seems to me that it is sufficient to show that they are distinct powers, different in nature, and called into exercise under different circumstances. For in the complexities of society and government, it cannot be otherwise than that oftentimes every power is carried far beyond its appropriate limits, and by pursuing the line of argument so much relied on, the excesses of one will be the means of enlarging the limits of another.

For these reasons, I think these acts of the legislature authorizing municipalities to extend aid to private railroad corporations cannot be sustained upon principle. My brethren think otherwise, and the question is so settled. The conclusion reached is no hasty one, but the result of long, patient, and careful examination; and the believers in the validity of municipal aid to railroads may look in vain through the books for an abler presentation of the argument in their favor than that given by my brother VALENTINE, in the preceding case of *Commissioners of Leavenworth Co. v. Miller* (*ante*, p. 257).

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7 Kansas, 210.

Railroad property.—*Assessment and Taxation of*—Chapter 124, Laws of 1869, is valid. Chapter 124 of the Laws of 1869, or so much of it as provides for the assessment of railroad property by a board of county clerks, and that the entire road shall be assessed as a whole and apportioned to the different counties, townships, &c., through which the road runs, is not unconstitutional and void.

Assessment, not vitiated by irregularities. Irregularities in the assessment made by the county clerks acting as a board, or acting separately under other statutes, will not render the taxes founded upon such assessment void.

County clerk—Deputy. A deputy county clerk, in the absence of his principal, may act as one of the "board of appraisers and assessors" to assess railroad property, as provided by chapter 124 of the Laws of 1869.*

Equity—Injunction—Taxes. A court of equity will not set aside such a tax, nor grant an injunction to restrain its collection, unless its collection would be inequitable and unjust; and the party seeking such a remedy must be prepared to do equity.

Error from Bourbon district court.

Petition for an injunction against Morris, as county treasurer, and Wheaton, as sheriff.

Prior to March 1, 1870, the plaintiffs, the Missouri River, Fort Scott & Gulf Railroad Company, had completed its track and roadway from Kansas City, Missouri, through the counties of Wyandotte, Johnson, Miami, Linn, and Bourbon, and to Girard, in the county of Crawford, in the State of Kansas, and was operating the same. The whole length of the road from

* The case of *Amrine v. Kansas & Pacific R. R.*, reported in 9 Kas. 178, was identical with the above, but no question, save as to the irregularity of the action of the deputy county clerk, was raised, and the case is omitted.—Ed.

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Kansas City to Girard) including two and thirty-two one-hundredths miles of side-track), is one hundred and twenty-nine and sixty-seven one-hundredths miles; of which five and a half miles are in Missouri, and one hundred and twenty-six and seventeen one-hundredths miles are in Kansas. About March 1, the auditor of the State of Kansas gave said railroad company notice that "the county clerks of Wyandotte and Johnson counties" would meet at Olathe on March 23 for "the purpose of assessing" the property of said company "according to law." At the time and place designated the county clerks of the two counties named did not meet by themselves, but they did meet in conjunction with the county clerks of Linn and Bourbon counties, and the deputy county clerk of Miami county, and the five officers so assembled organized as a board of assessors to assess the property of said railroad company, for taxation, as provided by chapter 124, Laws of 1869. The agent and attorney of the railroad company filed a protest against said board taking any action whatever, as a board of assessors, because no notice of the meeting of such board had been given to said company; because, if the board were to convene as such, under the act of March 4, 1869 (chapter 124), the county of Crawford should be notified, and be represented by her county clerk, and because the deputy county clerk of Miami county was not a legal member of said board. The board, however, proceeded to make a valuation and assessment of the property of the plaintiff, and agreed to assess the road-bed and right of way, including rolling stock, at eleven thousand six hundred and twenty-eight dollars and thirty-six cents per mile. That portion of the road, including side-tracks, lying in Bourbon county, is twenty-seven and fifty-five one-hundredths miles in length, which, at said valuation of eleven thousand six hundred and twenty-eight dollars and thirty-six cents per mile, with

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the sum of eleven thousand nine hundred dollars for depot grounds and stations, made the total assessment of plaintiff's property in said county three hundred and thirty-two thousand two hundred and sixty-one dollars, which was duly certified to the county clerk of said county.

Upon said assessment of the property of the plaintiff, the proper amounts of State, county, town, school, city, and other local taxes were levied and apportioned, amounting in the aggregate to the sum of thirteen thousand six hundred and forty-eight dollars and thirty-seven cents. Plaintiffs refused to pay the taxes so levied; whereupon, after January 10, 1871, *Charles A. Morris*, county treasurer, issued his warrant, as directed by section 123, chapter 107, General Statutes, for the collection thereof, and was about to place the same in the hands of *C. S. Wheaton*, sheriff of Bourbon county, when said railroad company, as plaintiff, commenced an action in the district court to restrain the collection of said taxes. Plaintiff applied to the district judge to grant a temporary injunction. Said motion was heard by the district court, due notice thereof being given. The defendants appeared and resisted the motion, and said application for a temporary injunction was overruled and denied. Plaintiff excepted; and said order denying said motion is assigned for error, and plaintiff brings the case here for review.

Wallace Pratt and *C. W. Blair*, for plaintiff in error. — 1. *Is chapter 124, Laws of 1869, constitutional?* While the power of taxation is one of the attributes of the sovereignty of the State, and one to be exercised by the legislature to an almost unlimited extent, yet there are certain fundamental rules, the non-observance of which by the legislature, in the exercise of this power, may cause the burden to be so oppressive upon the subject as to render it not a tax,

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but an unlawful confiscation of property. Among these rules, and the most important of all, is that requiring taxation to be equal and uniform. The State of Kansas has incorporated in its constitution this fundamental principle in the following apt and concise language: "The legislature shall provide for a uniform and equal rate of assessment and taxation." *Const. Art. 11, § 1.*

"Assessment upon real estate not lying within the taxing districts would be void, and assessments of personal property, made against persons not residing in the district, would also be void, unless made with reference to the actual presence of the property in such district." *Cooley on Const. Lim. 566.*

The residence of a private corporation is in the town where its principal office is located. *A. & A. on Corp. 8 ed. § 107; Conn. & Pass. Riv. Ry. v. Cooper, 30 Vt. 467; 2 Redf. on Railways, 382.*

In examining the provisions of chapter 124 above referred to, we find that this fundamental rule of taxation has been in part ignored. Sections 2, 3, 6. A new and distinct board or tribunal is created for assessing this particular class of property; the real property, track, road-bed, water and fuel stations, buildings, &c., are to be assessed as *personal* property, and assessed as such "*together with the moneys, credits,*" &c., of the company, and the whole to be apportioned among the several counties, giving to each such a proportion as the value of the property in that county bears to the whole in the State; and apportioning the rolling stock according to the number of miles of road in such county, notwithstanding portions of such rolling stock, such as yard and switch engines, may never have been in the county.

The plaintiff has nearly one hundred and fifty-seven miles of railroad in this State, and about three miles in the State of Missouri. Kansas City, in

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Missouri, is the northern terminus of the road, and there it has its machine shops, main depots, materials and supplies, and a large and valuable property connected with its road. Suppose, for instance, that the machinery, materials and supplies, stationary motive-power, money, credits and effects, depot buildings and other personal property of the plaintiff at Kansas City (leaving out of the question the possibly greater value of the real estate over that in Kansas), be valued at one hundred and sixty thousand dollars, then, under the provisions of section 8, above quoted, one hundred and fifty-seven thousand dollars of this amount would be apportioned to the State of Kansas for the purpose of taxation, and three thousand dollars left to be taxed by the State of Missouri.

This is a fair illustration of the practical working and effect of this law, and shows conclusively that it violates the rule of uniformity above stated, and hence is unconstitutional and void.

“Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the *mode of the assessment as well as in the rate of taxation.*” Ex. Bk. of Columbus v. Hines, 3 *Ohio St.* 1, 15.

Again; under the general tax law, real property of individuals is assessed and taxed as such, and an appeal or review may be had before a “board of equalizers.” Under this act of 1869, real property is assessed as personalty, and an appeal was provided by section 11 to the supreme court. This court, in *Auditor of State v. T., A. & S. F. R. R. Co.*, 6 *Kas.* 500, adjudged said section 11 to be void; hence, the equivalent for a “board of equalization” having failed, the rule intended to be prescribed certainly wants uniformity in its operation.

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2. Was the tax in question legally levied and assessed according to the provisions of said chapter 124, assuming said act to be constitutional?

An assessment and a valuation being essential requirements, the statute must be strictly pursued, in making them, or the proceedings based upon them will be illegal and void. *Black. on Tax Titles*, 106, 153.

No notice was ever given to the plaintiff of the time and place of the meeting of the board of appraisers and assessors, as is required by section 4; nor to the county clerk of Crawford county.

The board was also improperly and illegally organized by the admission of the *deputy* clerk of Miami county, as one of the members of the board, and by his taking part in their proceedings and demonstrations. The statute creates a new office, to wit, the office of "railroad assessor," and provides that the county clerk for the time being shall be such assessor. A deputy county clerk may act as "county clerk," in the absence of his principal, but he can no more act as "railroad assessor," in virtue of his "deputyship" than he could act as township trustee if his principal were chosen to such office, and should be absent from his township.

Nor is it any answer to this objection, to say that there was a quorum of county clerks present, without this *deputy*. If he had no right to sit and act with them, then he was an interloper, and the action of the board is a nullity. His vote and influence may have been the cause of the unjust and excessive valuation of the property of the plaintiff, and if *one* deputy can sit and act with the board, then why cannot the entire board be composed of deputies?

3. Can this action be maintained for the purpose of adjudicating the questions raised by the plaintiff in error? "Where power to levy the tax exists, but the

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proceedings to collect is illegal, the exercise of a speedy restraining power furnishes the State with notice of the illegality, and enables the government to re-assess the tax, and enforce the collection in a legal manner. If, on the contrary, *the tax itself is illegal*, the State has no right to harass her citizens by proceedings to enforce its collection." *Black. on Tax Titles*, 2 ed. 481, *et seq.*; *Burnett v. Cincinnati*, 3 *Ham. (Ohio)* 71; *Dean v. City of Madison*, 9 *Wis.* 402; *Knowlton v. Supervisors of Rock Co.*, *Id.* 410. And see section 268, chapter 80, *Gen. Stat.* p. 677.

The inherent powers of a court of equity are sufficient, without the aid of said section 253, to authorize its interference by injunction in the case at bar, and the plaintiff is entitled to the relief prayed for in its petition

Voss & French, for defendants in error.—1. The petition for the injunction is based upon section 253 of civil code. That section, in its language, is permissive only, and allows the court to enjoin: 1. The *illegal levy* of any tax, charge or assessment. 2. The *collection* of any *illegal* tax, charge or assessment. 3. The proceedings to enforce the same.

These are the only cases respecting taxes in which it is possible to successfully institute proceedings, to enjoin and restrain public officers from the performance of express statutory duties.

The plaintiff fails to bring its case within either class. No *notice* was essential; an insufficient notice did not prejudice the plaintiff. But due and sufficient notice was given. The *time* and *place* were specified when the county clerks would meet to assess plaintiff's property. It was not necessary to specify what particular county clerks; and mentioning those of two counties was surplusage.

The purpose and object of the notice is to aid the

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assessor in the proper performance of his duties in ascertaining and assessing *all* taxable property, and not merely to benefit the party to be assessed. The plaintiff knew the law; knew the counties into and through which its railroad was constructed; knew the purpose of the meeting; knew that all its property was subject to assessment, and must be assessed, and that by this tribunal. *Utile, per inutile non vitiatur*. See *Black v. Chicago & N. W. R. Co.*, 18 *Wis.* 208.

The law provides (section 3, chapter 124, Laws of 1869), the county clerks of the county through or into which the railroad shall run, shall constitute a board of assessors, &c. They need not all be present; a majority may act. Section 1, chapter 104, *Gen. Stat.* p. 999, subd. 4.

And a *deputy* county clerk may act for his principal. Section 41, chapter 25, p. 243.

The act of 1869, under which this assessment was made, is amendatory and supplemental to the General Tax Act of 1868. By the provisions of that act, chapter 107, General Statutes 1868, there are various duties enjoined upon county clerks, relating to the assessment and collection of taxes. By section 19, it is his duty to assess merchants and others therein named; can he act by *deputy* in that case? By section 29, the county clerk is required to assess certain property therein named; can he act by *deputy* in that case? By section 36, the county clerk is required to assess certain lands therein named; can he act by *deputy* in that case? By section 38, he is required to assess all lands that have been omitted; can he act by *deputy* in that case? By section 60, he is required to administer an oath to parties who, through sickness, &c., have been prevented from listing their property and to assess the same; can he act by *deputy* in that case? By section 65, he is required in cases therein named to correct the return of the assessor, and increase or diminish the

amount of the assessment, thus making a new assessment; can he act by *deputy* in that case? Most certainly. Then how can it be claimed that the *deputy* is incompetent to act in the assessment of railroad property, when no exception is made in that act?

The plaintiff claims that its property was assessed higher than other similar property throughout the State, and higher than other property in the same counties. The petition contains no allegation that the property was assessed at a greater value than the law requires. Besides, it has been uniformly held that one tax-payer cannot complain because others have not been properly assessed. Page v. City of St. Louis, 20 Mo. 136.

4. It is claimed that the act under which the assessment was made is unconstitutional. Because the legislature had no right to authorize an appeal to the supreme court, this does not invalidate the other portions of the act. But if, for argument, we admit the act to be unconstitutional, then the assessment is valid under section 53, p. 266, General Statutes 1868, chapter 25.

But the act is not unconstitutional. It is one of several acts, the whole constituting the general revenue laws of the State, having for their general object the establishment of an equal and uniform *rate of taxation*. This accomplished, the mode by which it is done is not material.

5. To return to section 253 of the civil code. Under that section can the plaintiff maintain this action, and enjoin the collection of the taxes complained of? If mere irregularities in the assessment of property and proceedings of revenue officers, is held to be fatal to the tax, then the government contains within itself the element of its own destruction. In a large and complicated revenue system like our own, where the work must of necessity be and is entrusted to men unfamiliar

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with legal forms and inexperienced in the duties of their offices, there always will be duties omitted, or at least imperfectly performed. Of this the judiciary will learn by the colossal appearance of their dockets, if every irregularity is held to be a ground for injunction. The statute itself is without precedent, and should receive the narrowest and most limited construction that its language will allow. The words of the statute may very properly be confined to cases—1. Where the tax to be enjoined is upon property not subject to taxation; 2. Where the tax is levied for an unauthorized purpose.

In these cases the tax is *illegal* and void. But irregularities in assessing and collecting a tax otherwise lawful, is neither an illegal nor void tax. *C. B. & Q. R. R. Co. v. Fry*, 22 *Ill.* 34; *Macklot v. Davenport*, 17 *Iowa*, 379.

6. The plaintiff must first do equity before it can ask equity. It must pay or offer to pay its just proportion of taxes upon its property. The omission to allege such payment or offer is fatal, and no injunction will be granted. *Roseberry v. Huff*, 27 *Ind.* 12; *Gillett v. Webster*, 15 *Ohio St.* 623; *Dean v. Gleason*, 15 *Wis.* 1; *Myrick v. City of La Crosse*, 17 *Id.* 442.

7. There is a misjoinder of parties. Wheaton is not shown to have held any warrant or authority to collect the taxes; and until the warrant reaches him he cannot be said to be doing, or about to do, any act prejudicial to plaintiff's rights. As to him, plaintiff is not entitled to any injunction, nor any relief.

BY THE COURT.—VALENTINE, J.—This action was commenced by the plaintiff in error in the district court of Bourbon county, to set aside and enjoin the collection of a tax, amounting in the aggregate to the sum of thirteen thousand six hundred and forty-eight dollars and thirty-seven cents, levied by the officers of

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said county upon the railroad property of the plaintiffs in error, and upon an alleged illegal and unauthorized assessment and valuation of said property, attempted to be made in pursuance of chapter 124 of the Laws of 1869. The tax roll, including this tax, was at the time of the filing of the petition in this case, in the hands of the said C. A. Morris, as treasurer of said county, for collection, and he was about to place a warrant in the hands of the said C. S. Wheaton, sheriff of said county, for the purpose of collecting said taxes. The plaintiffs moved the court for a temporary injunction against the said Morris and Wheaton, defendants, to restrain them from the collection of said tax. The court below, after hearing the evidence and the arguments of counsel, overruled the motion, and refused to grant the said injunction, whereupon the plaintiffs duly excepted and made a case for this court.

The questions presented for the adjudication of this court are—1st. Is chapter 124 of the Laws of 1869 (p. 244), a valid and constitutional law, so far as it affects the matters involved in this case? 2nd. Were the proceedings by which the property of the plaintiffs was valued, and such valuation apportioned to the different counties along the lines of their railroad, so irregular as to render the tax levied upon such valuation illegal and void? 3rd. Can this action be maintained for the purpose of adjudicating either of said questions? is it the proper remedy of the plaintiffs? and are the plaintiffs entitled to the relief they ask? Involved in these questions are many others, which we will consider as we proceed.

I. Is chapter 124, of the Laws of 1869, a valid and constitutional law, so far as it affects the subject-matter of this action? We think it is. The plaintiffs however claim that it is not—*first*, because it is in contravention of article 11, section 1, of the constitution, which provides that "The legislature shall provide for

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a uniform and equal rate of assessment and taxation ;” and *second*, because it is in contravention of article 3 of the constitution, as decided by this court in the case of Auditor of State v. A., T. & S. F. R. W. Co., 6 *Kas.* 500.

The plaintiffs claims that this act is in contravention of article 11, section 1, of the constitution, because it prescribes a mode for the assessment, taxation, and collection of the taxes on railroad property, different from that of other property in the same taxing districts, and because it provides “for the assessment of property without the taxing district, even to the assessment of property both real and personal lying in another State.” The principal, if not the only difference complained of in the mode of assessment, &c., is, that railroad property is assessed by county clerks, while other property is assessed by township assessors, and never by county clerks, except when it is omitted by the township assessors; railroad property is assessed along the whole line of the railroad, and in the aggregate, although it may run through many townships, or through many counties, or even out of the State; while other property is assessed for each township, and only so much of it as lies within the township; railroad property is all assessed as personal property, although much of it may be real estate, while other real estate is assessed as real estate; there is no provision allowing the county board of equalization to equalize the valuation of the real estate of a railroad company within each county, while there is a provision of law allowing the county board to equalize the valuation of other real estate; the taxes on railroad property are collected in the same manner that the taxes on personal property are collected, although a portion of the railroad property may be real estate, while the taxes on all other real estate are collected in a different manner. It will be seen that the counsel for the plaintiff miscon-

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strues the constitution. The constitution does not require that the *manner and mode of assessing and taxing* property, or the manner and mode of *collecting the taxes*, shall be equal and uniform; but it simply requires that all property shall be assessed and taxed at an *equal and uniform rate*.

This the legislature have provided for. All taxable property, real and personal, within this State, must, under the statutes, be assessed at its true value in money, and the taxes levied upon said assessment must be at an equal and uniform rate. The State taxes, under the statutes, are equal and uniform throughout the State, being levied on a uniform valuation, and fixed at a uniform rate on each dollar of the valuation throughout the State; each county tax is equal and uniform in the same manner throughout the county; and the same may be said of the taxes of each township, district, city and village; and this is all that is required by the constitution. *Hines v. Leavenworth*, 3 *Kas.* 201.

It is not only claimed that because other property is assessed by township assessors, that railroads should also be assessed by township assessors, but it is also claimed, that because a township assessor assesses property only which is situated within his own township, that therefore railroad property should be assessed separately in each township through which it runs; that long lines of railroad, for instance, extending through many townships and many counties, and from one end of the State to the other, should be so divided into pieces or sections, that each township assessor may assess just that portion of the road which runs through his own township, without any regard to the value of the rest of the road, or without taking the rest of the road into consideration. Probably the legislature could provide for just such an assessment, but it would be very absurd in its practical operation.

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A railroad is an entire thing, and should be assessed as a whole. It would be almost as easy and as reasonable to divide a house or a locomotive into portions, and assess each portion separately, as to divide a railroad into portions, and assess each portion of it separately. A portion of a railroad, running through one township only, would be worth but little if anything, while that same portion, in connection with the balance of the road, might be invaluable. The legislature have wisely provided that each road shall be assessed as a whole, and then, that the assessment shall be apportioned for taxation to each county, township, &c., through which the road runs.

The counsel for plaintiffs in error refers us to the case of the Exchange Bank of Columbus v. Hines (3 *Ohio Stat.* 15), but as the constitution of Ohio differs from ours in this respect, whatever may be the decision in that case, it has no application to this case. In Ohio, under their constitution, all taxation is to be by "*a uniform rule*;" in this State, under our constitution, it is to be at *a uniform rate*. The difference is plain.

It is also claimed that said act is unconstitutional, because it provides "for the assessment of property without the taxing districts, even to the assessment of property, both real and personal, lying in another State." To some extent said act provides as is claimed; but the assessment of property out of the State or out of the taxing districts is not made for the purpose of taxing said property, but only for the purpose of ascertaining the value of the property within the State, and within the taxing districts. No taxes are ever levied under the act, except upon property within the State, and within the taxing district. As we have already stated, a railroad is an entire thing, and cannot well be valued or assessed except as a whole. Hence the provision of the act that provides for taking the entire value of the road, and dividing it up by a certain rule

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for each county, township, &c., through which the road runs, is, at least, a reasonable rule, and except in rare cases, is probably as good a rule for determining the true value of each particular portion of the road as any other rule that could be adopted. We shall not declare the rule unconstitutional until it be shown that it has in some instance worked injustice, or until it is shown that the operation of the rule has clearly violated some provision of the constitution. In this case it has hardly been shown that the objectionable part of the rule has been applied; at most, it has not been shown that any real estate, not in Kansas, was taken into consideration in fixing the valuation of the road. And with reference to the rolling-stock, we suppose that it may all be assessed in Kansas, notwithstanding that it may also be used in Missouri. If such be the case, then it is simply a benefit to the railroad to have a deduction made on the rolling-stock, in proportion to the number of miles of railroad they have in Missouri. But even if the rule was applied in this case, it is not shown that it has worked any injustice to the plaintiffs in error. It is not shown that the road was assessed at more than its real value. It is not even shown that it was assessed at its value, or at half its value, and probably it was not so assessed. The entire valuation of the road, with all its property, including "the track, road-bed, right-of-way, water and fuel stations, buildings and the land on which they are situated, machinery, rolling-stock, telegraph lines, and all instruments connected therewith, material on hand and supplies provided for operating and carrying on the business of such railroad, together with the moneys, credits and all other property of such railroad company, used or held for the purposes of operating by such railroad," was considerably less than twelve thousand dollars per mile.

The plaintiffs in error also claim, that the whole of said

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act is unconstitutional, because the portion of the same which provides for an appeal from the appraisement of the county clerks to the supreme court is unconstitutional. There is but little foundation for this claim, however. The appraisement of the county clerks does not in the least depend upon the action of the supreme court for its validity. Such appraisement or assessment is complete in and of itself, and entirely independent of any action of the supreme court, and is therefore valid, with or without an appeal.

II. Were the proceedings by which the property of the plaintiffs was valued, and such valuation apportioned to the different counties along the line of their railroad, so irregular as to render the tax levied upon such valuation illegal and void? The plaintiffs in error claim that they were—*first*, because no proper notice of the time and place of the meeting of the county clerks was given to the plaintiffs in error; *second*, because no notice of the time and place of meeting of the county clerks was given to the county clerk of *Crawford* county, nor was he present at such meeting; *third*, because the *deputy* county clerk of Miami county was admitted as a member of the board of county clerks, and participated in the proceedings of the board, in place of the county clerk.

Said chapter 124 is a part of the general revenue law of the State, and must be construed with other portions of the revenue law. It is entitled "An act amendatory and supplemental to 'An act to provide for the assessment and collection of taxes,' approved February 27, 1868." Section 113 of the said act entitled "An act to provide for the assessment and collection of taxes" (chapter 107, General Statutes 1868), reads as follows:

"Section 113. No irregularity in the assessment roll, nor omission from the same, nor mere irregularities of any kind in any of the proceedings, shall invalidate any such proceeding, or the title conveyed by the tax

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deed ; nor shall any failure of any officer or officers to perform the duties assigned to him or them, upon the day specified, work an invalidation of any such proceedings, or of said deed."

It will be conceded that the notice to the railroad company was irregular, but only irregular. It mentions two of the county clerks along the line of the railroad, but not all of them. It was not necessary, however, that it should mention all or any of them, and that portion which does mention two of them may be stricken out as surplusage. But the notice itself is not a notice of a jurisdictional character. It is not required for the purpose of giving the county clerks the power to assess the property, but only for the purpose of enabling the owner of the property to be present and see that his property is assessed at a fair value. Even if no notice had been given, the assessment would not for that reason be void. Notice to the owner of the property is never, so far as we are aware, made a prerequisite to a valid assessment. It is true that if any injustice should be done to the property-owner on account of no notice being given, then he would be entitled to some remedy. But such is not this case. No injustice or even hardship has been shown in this case. We also think that this notice, though irregular, is sufficient under said section 113.

We are also inclined to think that section 113 will cure the second irregularity ; but we do not propose to decide the question now, but will proceed to the consideration of the next question, which is, whether a deputy county clerk may in the absence of the county clerk perform the duties of the county clerk. This question we have already decided in the case of *Amrine v. Kansas Pacific R. R. Co.*, 7 *Kas.* 178. We think the record in this case shows that the county clerk of Miami county was absent, and therefore that the deputy had a right to act in his place ; but if it does not so

show, still it will be presumed, in the absence of anything to the contrary, that the circumstances were such as to authorize the said deputy to act. *Sexton v. Rhames*, 13 Wis., 99, 101.

We will now for the sake of this argument, and for that only, consider that the said act (chapter 124, Laws of 1869), is unconstitutional and void, and that the said assessment was so totally at variance with the provisions of said act, that if it has to depend for its validity upon that act alone, it is void, whether the act itself is void or not; and still we think the *assessment, as made*, is not void. Under the old law railroads were assessed by the county clerks respectively of each county through which the road run—the county clerks acting separately, and not as a board, as under the present law, and the railroad companies were required to list their property for such assessment and for taxation. *Gen. Stat.* 1030, § 29. But if the railroad companies did not so list their property for assessment and taxation, and the same was omitted, then the county clerk had the right, without such listing by the railroad company, to assess such property (*Gen. Stat.* 266, § 53; *Id.* 1041, § 65); or, if the property was real estate, and the county clerk so chose, he could notify the proper assessor and let him assess it (*Gen. Stat.* 1033, § 38); or, if the same was personal property, the county commissioners also had the right to assess it. *Gen. Stat.* 1041, § 65. It seems from these statutes that it was not the intention of the legislature that any property, under any circumstances, should escape assessment and taxation: Even if a merchant, trader, or freighter, commenced business in the county after March 1, and before November 1, it was the duty of the county clerk to assess such merchant, trader, or freighter, unless he had been previously assessed (*Gen. Stat.* 1027, § 19); and if any property entirely escaped assessment and taxation for the whole year, it was the

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duty of the assessor to assess it at double its value for the next year. *Gen. Stat.* 1038, § 55.

Now while the Laws of 1869 made some changes in the mode of assessing property at the first, or original assessment, for instance, providing that a *board* of county clerks, instead of the county clerks individually, should assess railroad property (*Gen. Stat.* 1030, § 29; *Laws of* 1869, ch. 124); and providing that township trustees, instead of county assessors, should assess real estate (*Gen. Stat.* 1032, § 31; *Laws of* 1869, 113, § 3), yet no change has been made for the assessment of property that has been omitted to be regularly assessed; and hence it necessarily follows, that if the assessment by the board of county clerks was for any reason absolutely void, then, that each county clerk had the right to assess so much of the road as runs through his own county. Now the record in this case shows that Mr. C. Fitch, county clerk of Bourbon county, made the assessments of which the plaintiffs in error complain. It was upon his motion and at his figures that the whole road was assessed. It is true, that the manner of making the assessment was irregular; but mere irregularities do not render assessments void in this State. *Gen. Stat.* 1057, § 113.

III. We now proceed to consider the last question in this case. Can the plaintiffs maintain this action, and are they entitled to the relief they ask? If the said taxes were absolutely void; if the property was not subject to taxation; if it was exempted by law from taxation; or if the taxing officers had no jurisdiction over it, nor power to tax it, then there could hardly be any doubt of the right of the plaintiffs to maintain this action, or of their right to the relief they ask. *Gen. Stat.* 677, § 253. On the other hand, if everything concerning the tax proceedings from the listing of the property for taxation up to and including said intended collection was entirely legal and regular,

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then clearly the plaintiffs would not be entitled to maintain this action, or any other action, and they would not be entitled to the relief they ask in this case, or to any relief in another case.

In the case at bar the tax is not absolutely void, and neither is it free from all irregularities. Can the plaintiffs then maintain this action to set aside said tax or to restrain its collection? This depends, as we think, upon the question whether the tax is inequitable and unjust, or whether it would be against conscience and good morals to enforce its collection; for the order of injunction is an equitable remedy, which cannot be granted except in aid of equitable rights; and a party who seeks equity must be prepared to do equity. No complaint is made in this case of the manner in which this tax is about to be collected. If it can be collected at all, it seems to be admitted that the officers are proceeding in the proper manner. The complaint is, that the tax cannot be collected at all. The naked question then presented to us, is, whether it is equitable and right for the plaintiffs to pay said tax; or rather, whether it is equitable and right for them to pay any tax; for they have as yet made no offer, so far as is shown by the record in this case, to pay any tax, and do not even admit that they are in equity bound to pay any tax. They seem to desire to be freed from the payment of all taxes. Is this equitable and just? "The payment of taxes equitably and fairly assessed is a duty which every man is under the strongest legal and moral obligation to perform to the government which affords him protection in his person and property. Governments cannot exist without their revenues, and taxes are levied and contributions enforced upon the principle that they are but just returns for the protection and advantages derived from them. In this sense a proper tax—one which is just and correct in principle—is a debt due the government, which the owner of property has no more right

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in equity and conscience to withhold, than the most sacred debt of a private nature. It is, indeed, when seen in the light of reason and justice, far more sacred and obligatory, inasmuch as the considerations whence it proceeds are the highest and most inestimable rights and privileges enjoyed by the citizen. To withhold it, therefore, is a public wrong, which affects the whole community, and which cannot be justified or excused by any rule of equity or sound morality. This is the just and enlightened view of a court of equity, which never moves except to prevent fraud and injustice, and where the relief asked conforms to the principles of rectitude and honesty. It is very well known that there are many persons whose moral perceptions are so obscure and confused, and whose selfishness is so great, that they seem to regard almost any means by which the revenues of the State may be defrauded, or moneys in the public treasury got out, as upright and honorable. One might suppose from their conduct that they considered such practices the highest evidence of public virtue and patriotism. Unfortunately for such projects, courts of equity take a different view; and that branch, at least, of the government against whose success and prosperity they are aimed, will, if applied to, promptly refuse its aid. The collection of a tax, under the statute, is a legal proceeding to enforce the payment of a debt due the public; and like proceedings at law upon a private claim, equity will only interfere to prevent injustice by the unfair use of the process of the law. The primary and controlling principle in such cases is, that the proceedings to be stayed are inequitable and unjust, and that it will be against conscience to allow them to go on.' Warden v. Sup. Fond du Lac Co., 14 Wis. 619. Is it equitable that a corporation, the mere creature of the laws of the State, should refuse to bear its share of the public burdens of the State? The plaintiffs do not complain

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that the tax is too much ; possibly, if their property had been assessed at its actual value, as the law requires that it should be, their taxes would have been double or treble what they are.

It is not sufficient to set aside this tax, or to grant the injunction prayed for, that other property in Bourbon county, or other railroad property in the State, has been assessed at a lower rate than the property of the plaintiffs. Perhaps the assessors of Bourbon county, or the assessors of other railroads, have not done their duty, and have assessed property too low ; but that is not a sufficient reason for setting aside the whole of the taxes of the State, where a proper assessment has been made, as we must do if we set aside any portion of the same.

In conclusion we should say, that we do not think that any court of equity ought ever to interfere to set aside a tax that is merely voidable, or to restrain the collection of such tax by injunction, unless strong equitable grounds exist for such interference. *Minturn v. Hays*, 2 *Cal.* 590 ; *Bank, &c. v. Hines*, 3 *Ohio St.* 1 ; *McCoy v. Chillicothe*, 3 *Id.* 370 ; *Brewer v. Springfield*, 97 *Mass.* 152 ; *Susquehanna, &c. v. Supervisors*, 25 *N. Y.* 312, and cases ; *Burns v. Mayor of Atchison*, 2 *Kas.* 454 ; *Warden v. Supervisors, &c.*, 14 *Wis.* 619 ; *Roseberry v. Huff*, 27 *Ind.* 12 ; *Gillett v. Webster*, 15 *Ohio*, 623 ; *Bond v. Kenosha*, 17 *Wis.* 284 ; *Meyrick v. La Crosse*, 17 *Id.* 442 ; *C. B. & Q. R. R. Co. v. Frary*, 22 *Ill.* 34.

No such equitable grounds are shown to exist in this case, and therefore we think the court below did right in refusing to grant the temporary injunction asked for by the plaintiffs ; and the order of the court below must be affirmed.

All the justices concurred.

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7 *Kansas*, 382.

Action—Illegal taxes. A person against whom no illegal tax has been assessed or levied cannot, by injunction, restrain the collection of an illegal tax against another person.

Injunction—*When it will not lie.* Injunction will not lie to restrain the commission of a pure, simple and naked trespass. If an officer holding a warrant for the collection of taxes assessed against A., levy said warrant on the property of B., the latter has his remedy by action of replevin against the officer, or by action for damages.

Error from Bourbon district court.

The Missouri River, Fort Scott & Gulf Railroad Company as plaintiffs commenced an action in the district court of Bourbon county to restrain the defendant, C. S. Wheaton, who is sheriff of said county, from collecting certain taxes said to be illegal. A motion was made in said case before the judge of said court, at chambers, for a temporary injunction to restrain the collection of the taxes until the case could be finally heard in court. The judge overruled said motion, and this ruling the plaintiffs assign for error.

The taxes were assessed against or in the name of the "Western Union Telegraph Company," and not against the plaintiff; and the warrant held by the sheriff run against the *telegraph* company, and not against the *railroad* company. The property assessed belonged to the *railroad* company; and they claimed that the assessment was illegal, alleging the same objection as in the preceding case against Morris (*ante*, 353), the assessment being made at the same time and by the same board of assessors.

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Pratt & Blair, for plaintiff in error.

Voss & French, for defendant in error.

BY THE COURT.—VALENTINE, J.—The petition below, and the evidence used on the hearing of the motion for a temporary injunction show, or tend to show, that the taxing officers of Bourbon county assessed a tax against the "Western Union Telegraph Company," on a certain telegraph line running through said county, which did not in fact belong to the said telegraph company, but did belong to the plaintiffs; that a warrant was issued by the treasurer of said county against the goods and chattels of the said telegraph company, and that the said defendant, as sheriff of said county, threatened to levy the said warrant on the said telegraph line of the said plaintiffs.

Two questions arise in this case: *First*. Can the *Missouri River, Fort Scott & Gulf Railroad Co.* maintain an action to restrain the collection of an illegal tax assessed against the "Western Union Telegraph Co.?" Or, in other words, can A., against whom no illegal tax has been assessed, maintain an action against the officers of Bourbon county because they have assessed an illegal tax against B.? We answer this question in the *negative*; and without any comment, proceed to the next question. *Second*. Will an injunction be granted to restrain an officer from levying a tax warrant on the plaintiffs' property when the said warrant does not purport to give to the said officer any authority or color of authority to make such levy? Or, in other words, will injunction lie to restrain the commission of a pure, naked, and simple trespass? We must also answer this question in the *negative*. The said warrant was not against the railroad company, nor against their property, nor against any specific property belonging to any one; but it was simply against the "Western

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Union Telegraph Company," and against the goods and chattels of said telegraph company only. Under the warrant the sheriff had the right to levy on any goods and chattels of the said telegraph company, but on no other property, nor on the property of any other person, company, or corporation. If the sheriff should levy on the property of the railroad company, the railroad company would of course have a cause of action against the sheriff in replevin or for damages, in the nature of an action of trover, or of trespass *de bonis asportatis*; but they cannot have an injunction to restrain the anticipated trespass. We are not aware that any pure, simple, and naked trespass has ever been restrained by injunction.

The order and judgment of the court below must therefore be affirmed.

All the justices concurred.

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81 Iowa, 211.

Jury and verdict: latent defects: affidavits. When a jury agree in advance to be bound by a verdict arrived at by each marking down a separate amount and dividing the aggregate thereof by twelve, the verdict will be held invalid, and set aside.

Affidavits of members of the jury are, in such case, admissible to show the manner in which the verdict was arrived at.

Verdict void in part. Where a verdict arrived at in the manner above indicated is only void in part, the valid portion will be permitted to stand on the defendant's entering a remittitur as to the excess.

Railroad: statute penalty: act of 1862. In an action to recover of a railroad company the penalty prescribed by section 2, chapter 109, Laws of 1862, for making excessive charges of freight or fare, it

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is not necessary for the plaintiff to show that the overcharge was *willful* on the part of the company.

Constitutional law: commerce between the States. Said section is not in conflict with the constitution of the United States (article 1, section 8) in that it seeks to regulate commerce between the several States. Following the preceding case between the same parties.

Action by plaintiff against defendant as a railway company, brought under chapter 169 of the acts of 1862, claiming the penalties prescribed by that act for overcharges upon several shipments of goods from Chicago to Marshalltown over defendant's road in 1868. The petition also seeks to recover back the alleged overcharges, and also penalties for failing to post rates of freight charges, as required by the act above referred to.

The defendant pleaded three defenses:

1. Admitting that the defendant was a railway corporation as alleged; admitting the shipments and dates thereof, but denying that the goods were overcharged, and all other allegations not admitted.

2. That, at time of shipment and commencement of suit, defendant was a corporation, duly organized under a charter or act of incorporation passed by the general assembly of the State of Illinois.

3. That defendant is a corporation having its principal place of business and residence in Chicago, Illinois, and operating a continuous line of railroad, as lessee, from Chicago to the Missouri river in the State of Iowa, keeping an office in Marshalltown, Iowa, for receiving passengers, &c.; carried, &c., in the State of Iowa, and from one State to another State, over said road; that defendant was operating said line in and during the months of May and June, 1868; that the goods, &c., referred to in petition were shipped at times stated, from Chicago to Marshalltown; that, by the constitution of the United States, exclusive power is given to

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Congress to regulate commerce among the several States; that the acts, referred to by plaintiff, of the general assembly of Iowa, under and by virtue of which plaintiff sues, are unconstitutional and void, &c.

The plaintiff demurred to the second and third defenses set up in the answer. The demurrer was confessed as to the second defense, and sustained by the court as to the third, to which ruling the defendant excepted and stood upon his answer. The issues made by the first defense set up in the answer were tried by a jury. Verdict for plaintiff for three hundred and seventy-eight dollars and thirty-three cents. Defendant's motion for a new trial overruled, and judgment for plaintiff on the verdict. Defendant appeals.

Henderson Bros. & Merriman, for the appellant.

Boardman, Brown & Williams, for the appellee.

MILLER, J.—I. One ground for appellant's motion for a new trial in the court below was, that there was irregularity on the part of the jury in making up their verdict. In support of this, appellant filed affidavits of four of the jurors showing that it was first proposed and agreed by the jury that they would find for the plaintiff in a sum of not less than three hundred dollars, being one hundred dollars on each of the first three counts in his petition, and that they would not find for plaintiff on the fourth count of his petition; that it was further agreed that each juror should mark down such sum as he thought plaintiff was entitled to, not less than three hundred dollars, nor more than four hundred and ninety-nine dollars, the whole amount claimed in the petition, and divide the aggregate by twelve, the quotient to be the verdict, and that the verdict of the jury was thus arrived at.

It has been frequently held by this court that when the jury agree in advance to be bound by the result,

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and then make up their verdict by each juror marking down or stating a sum, the aggregate of these sums divided by twelve, and the quotient adopted as the verdict, such verdict will be set aside and a new trial granted. *Barton v. Holmes*, 16 *Iowa*, 252, and cases there cited; *Manix v. Maloney*, 7 *Id.* 81; *Schanler v. Porter*, *Id.* 482; *Denton v. Lewis*, 15 *Id.* 301; see also, *Wright v. Ill. & Miss. Telegraph Co.*, 20 *Id.* 195.

It is also settled by these cases that affidavits of jurors are admissible to show such infirmity in the verdict.

In this case the record shows that the jury *regularly* found for the plaintiff on the counts in his petition claiming penalties for overcharges on freights, viz: not less than one hundred dollars on each of the first three counts, that they also found that the plaintiff was not entitled to recover on the other count for failing to post rates of freight, and that the amount of the verdict in *excess* of three hundred dollars was improperly ascertained as before shown. The verdict, therefore, being regular to the extent of three hundred dollars, the cause will not be reversed on the ground if the appellee shall remit the excess over that sum and pay the costs of this appeal.

II. The appellant in his argument urges that the plaintiff cannot combine a cause of action for the statute penalty for overcharging and another to recover back the amount of the overcharges, and recover on both. Without passing upon this point, it is sufficient to say that, in the view taken in the first part of this opinion, the plaintiff only recovers the statute penalty for overcharging on each of the first three counts in his petition, no recovery being allowed for anything beyond this. Hence the appellant is not prejudiced by the combination of causes of action complained of by him. This question, however, we have decided in the preceding case between these same parties.

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III. The appellant further insisted the evidence is insufficient to entitle the plaintiff to a verdict for the penalty prescribed by the statute for overcharges. In other words, that the verdict was not sustained by sufficient evidence.

The provision of the statute under which this action is brought reads as follows: "In the month of September, annually, such railroad company shall fix its rates of fare for passengers and freight, for transportation of timber, wood and coal, per ton, cord, or thousand feet, per mile; also, its fare and freight per mile for transporting merchandise and articles of the first, second, third and fourth grades of freight; and, on the first day of October following, shall put up, at all the stations and depots on its road, a printed copy of such fare and freight, and cause a copy to remain posted during the year. *For willfully neglecting so to do, or for receiving higher rates of fare or freight than those posted*, the company shall forfeit not less than one hundred dollars nor more than two hundred dollars to any person injured thereby and suing therefor."

The appellant insists that, although the evidence amounts to "proof" which would be necessary to establish a case, under the statute, were the word "willfully" omitted, yet that it fails to make a case with that word inserted in the statute. By a careful reading of the provision of the statute above quoted, we find that the word "willful" is omitted from that part of the same imposing a penalty for receiving higher rates than those posted. The law in question, after prescribing that the rates, &c., shall be fixed by the company in September and printed copies thereof posted up in October, at each of their stations, then provides that, "for *willfully* neglecting so to do" (that is, for willfully neglecting to fix and post their rates, as required by the statute), "or for receiving (not willfully) higher rates of fare or freight than those posted,

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the company shall forfeit," &c. The general assembly, by the act, says, to each railroad company doing business in Iowa: "You shall fix your rates of fare and freight at a certain time each year, and put up a printed copy of the same at each of your depots, and keep it there posted during the year, and if you *willfully* neglect so to do you shall forfeit not less than one hundred dollars nor more than two hundred dollars, or if you receive higher rates of fare or freight than those thus posted you shall be liable to a like forfeiture." This is manifestly the plain meaning and purport of the statute. In order to recover the penalty for neglecting to fix and post rates, the proof must show that such neglect was willful, but this element of willfulness is not necessary in an action for the penalty for excessive charges. The penalty is imposed for "receiving higher rates than those posted" by the company as their regular charges. The verdict of the jury, therefore, is supported by sufficient evidence, as appellant concedes. See following case of Fuller v. C. & N. W. R. R. Co.

IV. The next error assigned by appellant is the order of the court sustaining the demurrer to the third clause of the answer, setting up that the defendant is a foreign corporation, having its principal place of business and residence in Chicago, in the State of Illinois, and operating a continuous line of railway as lessee from the latter place to the Missouri river, keeping an office at Marshalltown, Iowa, for receiving passengers and freight carried in this State, and from this State to another State, and that it was so operating its said railway in the months of May and June, 1868; and that the goods referred to in plaintiff's petition were shipped on said railway, as alleged, from Chicago, Illinois, to Marshalltown, Iowa; and he insists that the act of the general assembly of Iowa, imposing the penalties sued for, are in conflict with the constitution of the United States which confers upon Congress ex-

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clusive power to regulate commerce among the several States.

In another case in this court, between these same parties, this question is disposed of in the opinion of the court delivered by Mr. Justice BECK, in an able and satisfactory manner, and we deem further discussion unnecessary.

Affirmed.

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31 Iowa, 187.

Railroad: effect of statute penalty. Act of 1862, section 2, chapter 169, Laws of the Ninth General Assembly, making railroad companies liable to a penalty for violations of its provisions, in failing to fix and post rates of fare and freight, and for overcharging, was not intended to deprive a person from whom overcharges were collected from recovering the amount paid him in excess of the rates fixed. He may, in an action against the company, recover the amount wrongfully collected and, also, the penalty provided by the act.

Estoppel. Whether the plaintiff could recover the overcharge if he knew at the time of payment that it was in excess of the rates fixed, *quere*. But if he were ignorant of that fact at the time, he could recover.

Character of intent. The word "willfully," as used in said section, does not imply the idea of malice; and if it be shown that the railroad company designedly omitted to do the things enjoined by the act, it will be sufficient to fix its liability to the penalty prescribed. Whether such omission was by design or through mistake or inadvertence is a question of fact for the jury.

Evidence: declarations. Evidence of the plaintiff's declarations to the drayman who delivered the goods to him, to the effect that he thought the freight charges were too high, was held admissible on the part of plaintiff as showing a fact connected with the payment of the overcharge.

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Constitutional law: commerce between the States. The aforesaid section is not in conflict with article 1, section 8 of the constitution of the United States, on the ground that it infringes on the right of Congress to regulate commerce between the several States. Such acts are in the nature of police regulations indisputably within the legislative power of the State.

Action to recover a statute penalty and overcharges paid on merchandise transported upon defendant's railroad.

The facts of the case appear in the opinion. There was a verdict and judgment thereon for plaintiff. Defendant appeals.

Henderson & Merriman, for appellant.—1. A penal statute in derogation of the common law must be strictly construed, and a party suing for a statute penalty is confined to the remedy provided by the law.

The plaintiff cannot rely for his cause of action upon a statute which gives him a specific remedy and yet combine with that remedy a totally different and distinct cause of action; or, more specifically, the plaintiff cannot combine in his action a claim for the penalty under a statute which gives him a penalty *only* for an excessive charge for transportation, and also a claim for the excess.

The statute fixes a penalty *in all cases of willful overcharge*, which, it is evident from the terms of the statute, is to compensate and *fully indemnify* the party injured by the excessive charge, and provides no other remedy.

That this is the correct interpretation of the statute is fully determined, in our opinion, by the maxim, "*Expressio unius, est exclusio alterius.*" *Brown v. Buffalo & State Line R. R.*, 22 *N. Y.* 191.

In the above case the court refer to and approve *Behan v. People*, 17 *N. Y.* 517, and therein state, "that the legislature, having fixed the penalty at the

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same time of prohibiting the act, designed there should be no further punishment."

Our statute, prohibiting an overcharge by implication only, merely provides that, in case of a willful overcharge, the penalty shall attach, negating, by its very terms, any other remedy or cause of action.

An overcharge before the passage of the statute was attended with no other consequences than liability to pay it back, if the party paying it reserved the right by *protest*.

Now that the statute has provided a penalty for the act, the penalty only can be enforced. In *People v. Stevens*, 13 *Wend.* 341, the court say: "Where a statute creates a new offense by making unlawful that which was lawful before, and prescribes a penalty and mode of proceeding, that penalty alone can be enforced;" and to same effect, Lord MANSFIELD in *Rex v. Robinson*, 8 *Burr.* 800; 1 *Russ. on Cr.* 49; 1 *Chitty Pl.* 118; *Martin v. Taylor*, 1 *Wash. C. Ct.* 1.

Furthermore, no greater hardships should be imposed for the commission of a prohibited act than the statute prohibiting it will permit. *Schooner Enterprise*, *Paine C. Ct.* 32; *The Industry*, 1 *Gall. C. Ct.* 114.

This action arises out of shipments of goods over a year prior to the commencement of it. The evidence shows that the money was paid voluntarily, without protest or objection. The plaintiff has bound himself by the payment of the entire freight, and is estopped from now denying his voluntary act.

The alleged excessive charges were therefore voluntary payments, and cannot be recovered back. *N. Y. & H. R. R. Co. v. Marsh*, 12 *N. Y.* 312; *Fleetwood v. City of New York*, 2 *Sandf.* 475; *Lowber v. Selden*, 11 *How. Pr.* 527; *Hall v. Shultz*, 4 *Johns.* 240.

In all of which cases it was held that money paid voluntarily cannot be recovered back, even though its payment could not have been enforced by law.

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Money paid, unaccompanied by remonstrance or protest, is a voluntary payment, and cannot be recovered back, whether paid under mistake of law or not. *Elliot v. Swartwout*, 10 *Pet.* 153. And payment in such cases nullifies the claim. 4 *Johns.* 240; 2 *Sandf.* 476.

The evidence shows that this money (alleged excessive charges) was, in point of fact, paid voluntarily. The attention of the defendant or any of its authorized agents was not called to the charge, nor is there any evidence showing, or tending to show, that the plaintiff himself considered the charge excessive, so far as the defendant's actual rates were concerned. He does not say he did certainly, and the case of *Elliot v. Swartwout*, therefore, applies to this case.

But admitting, for the purpose of argument, that he did know the rates, and that there was an illegal charge under the statute, then he should not have paid the money except under the most solemn protest, of which there is no evidence. The law required that of him, as we have heretofore shown. The law was open to him as it was to defendant, and he had no more right to entrap defendant by proceeding contrary to law in making the payment, than defendant had to insist upon full payment where it was shown to be wrong.

We, therefore, insist that it is not in the power of plaintiff to thus take advantage of his own wrong.

We have looked in vain for any case in which the amount paid was allowed to be recovered back, in a case like this, under a similar statute. Some cases may be referred to, as was done in the court below, like that of *Chase v. New York Central R. R.*, 26 *N. Y.* 523, as sustaining the right to recover back, but an examination of that case will show that the statute, in addition to the penalty, expressly provided for recovery of the excess.

Nor are the old English cases, upon the question of

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excessive charges, authority, the decisions being upon their statute of "*Tolls*," which expressly provided for the recovery of the excess.

The court below, therefore, erred in refusing to instruct the jury that the claim for money paid as excessive charges, could not, in any event, under the evidence, be recovered.

II. The evidence does not authorize a recovery of the penalty.

The plaintiff cannot recover the penalty claimed and provided by the statute, for if his allegations are sufficient to base a right of recovery upon, still the evidence does not sustain the allegations, nor does it tend to sustain them.

To constitute a right of action in favor of the plaintiff, there must be a *willful* disregard of the matters and things, enjoined by the statute, on the part of the defendant.

The failure to post, &c., or the mere receipt of a greater rate of freight or fare than that posted, does not constitute a cause of action, else the term "*willfully*" would be without meaning.

The term "*willful*" is defined by the courts, and understood "*to extend a little further than intention-ally or designedly, and to approximate the idea of the milder kind of malice: that is, as signifying an evil intent without justifiable excuse.*" *Chapman v. Commonwealth*, 5 *War.* 427, 429.

Chief Justice SHAW says: "With bad purpose, corruptly." 1 *Bish. Crim. Law*, § 262.

This evil intent will not be presumed absolute, and plenary proof of the willfulness will be required by the court. *Nelson v. Eaton*, 26 *N. Y.* 405.

Nor will the court *presume* a state of facts, in order to create a forfeiture upon proof of facts, which, without such presumption, would not create the forfeiture; that is, the excessive charge being shown, the willful-

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ness will not therefore be inferred or presumed, it must *also* be shown. 29 *Barb.* 325; 1 *Chitty's Crim. Law*, 233; 1 *Bish. Crim. Law*, § 8, n. 8; *Id.* § 253.

And the courts will require that the plaintiff alleging such intent shall prove it *precisely*. See last above authorities; 3 *Peters Dig.* 208, § 21; 1 *Bish. Crim. Law*, § 227 and cases cited.

III. The power of Congress to regulate commerce is exclusive.

The court erred in sustaining plaintiff's demurrer to the answer, and in refusing the instruction asked by defendant, relating to the unconstitutionality of the State law.

1. Section 2, chapter 169, laws of the ninth general assembly of the State of Iowa, so far as the same is applicable to the matters in controversy in this suit, is repugnant to the constitution of the United States and the laws of Congress, and null and void.

2. Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Art. 1, § 8, *Constitution U. S.*

3. By act of Congress, June 15, 1866, every railroad company in the United States, whose road is operated by steam, is authorized to carry *passengers, freight and property* on their way from *any State to another State*, and to receive *compensation* therefor. 14 *U. S. Stat. at Large*, 66.

4. The only questions to be considered in determining whether the State law is repugnant to the constitution of the United States, and the laws of Congress thereunder, as a regulation of *fare and freight* on the transportation of *passengers, freight, and property* on their way from one State to another, are, first, whether the power to regulate commerce among the several States is exclusively vested in Congress; and, second, whether the carrying of such passengers, freight and property from State to State for hire or compensation is

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commerce; for if it is, it is commerce among the several States. If these two propositions be, as they must, admitted, then it follows that a State cannot in any manner regulate such hire and compensation any more than it can restrict or interdict the carrying of the persons or the goods. The State cannot do indirectly that which it has no power or authority to do directly; nor require the carrier, under heavy penalties, which may be made, and which, as the law now stands, are, a mode of taxation, to regulate what it cannot regulate itself.

The leading case which, beyond all cavil, has forever settled these questions, is that of *Gibbons v. Ogden*, reported in 9 *Wheat*. 196.

5. The power to regulate commerce among the several States is *exclusively* vested in Congress, as absolutely so as it would be in a *single* government, and *no part of this power can be exercised by a State* *Gibbons v. Ogden*, 9 *Wheat*. 196.

6. The power to regulate commerce intended to be granted was the power which *previously* existed in the States, and it is *necessarily exclusive*. *Gibbons v. Ogden*, 9 *Wheat*. 197, *et seq.*

7. The *grant* is *general* and *unlimited in its terms*, and *necessarily excludes* the action of all others. The full power to regulate implies the whole power and leaves no *residuum*. *Gibbons v. Ogden*, 9 *Wheat*. 198; *Brown v. Maryland*, 12 *Id.* 446; *Story's Com.* 1063.

8. Whenever the terms in which a power is granted by the constitution, or whenever the nature of the power itself requires that it shall be exclusively exercised by Congress, the *subject is as completely* taken away from State legislation as if they had been forbidden to act. *Sturges v. Crowninshield*, 4 *Wheat*. 193; *Holmes v. Jennison*, 14 *Pet.* 576, 591.

10. The power to regulate commerce is just as exclusive of State legislation as the power to borrow

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money on the credit of the United States; to establish uniform rules of naturalization; to coin money; to establish post-offices and post-roads; to declare war. Passenger Cases, 7 *How.* 394.

11. The proposition that a State may pass *any* act to *obstruct or regulate* commerce, which does not conflict with any act of Congress, would contradict the language of the court in *Gibbons v. Ogden*, *Brown v. Maryland*, and every other case in which the commercial power has been considered. Passenger Cases, *supra*, 398.

12. A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. The action of one necessarily precludes the other, and that which is first, being competent, must establish the rule. Passenger Cases, *Id.* 399.

13. A concurrent power in the States to regulate commerce is an anomaly not found in the constitution. Passenger Cases, *Id.* 396.

14. No State can regulate foreign commerce, or commerce among the several States, because the power is exclusively vested in Congress. Passenger Cases, *Id.* 400.

15. That the power to regulate commerce among the several States is exclusively vested in Congress, is as fully established as any other power under the constitution which has been controverted. Passenger Cases, *Id.* 408.

16. The intention was to establish among the States a perfect equality in respect to commerce and navigation, and this intention can neither be interrupted by Congress nor by the States. When Congress enacts regulations of commerce, it does so for the United States, and the equality exists. When a State passes a law *in any way* acting upon commerce, it can only do so for

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itself, and the equality is destroyed. In such case the constitution would be violated, both in the spirit and in the letter. *Passenger Cases*, *Id.* 420.

17. A State cannot interfere in any manner with commerce authorized and regulated by Congress, whether it be persons, freight or property, *until the persons are landed, and the freight or property have become a part of the general mass of property of the State.* *Passenger Cases*, *Id.* 422.

18. The power claimed (not the exercise of the power) by the State is in its nature in conflict with the power given to Congress, and the extent to which it may be exercised does not enter into the inquiry concerning its existence. The power is complete in itself, and has no limitations other than are prescribed by the constitution itself, and it is co-extensive with the subject on which it acts. *Brown v. Maryland*, 12 *Wheat.* 446, 447; *Gibbons v. Ogden*, 9 *Id.* 196.

So that in the language of the learned Justice McLEAN, with whom Justices WAYNE, CATRON, McKINLEY and GRIER concurred, in the *Passenger Cases* above cited: "Whether we consider the nature of the commercial power, the class of powers with which it is placed, the decision of the supreme court of the United States in *Gibbons v. Ogden*, reiterated in *Brown v. Maryland*, and often reasserted by Mr. Justice STORY, who participated in these decisions, we are brought to the conclusion that the power to regulate commerce with foreign nations and among the several States is exclusively vested in Congress, and that no State can exercise any part of that power." This is not only sustained by all the decisions of the supreme court of the United States, but by every approved rule of construction, and, in conclusion upon this point, we refer to the dissenting opinion of Mr. Justice STORY (which is sustained in the *Passenger Cases* above), in the case of *City of New York v. Miln*, 11 *Pet.* 158; *Houston v.*

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Moore, 5 *Wheat.* 22; 2 *Story's Com. on Const.* § 1063; 1 *Kent Com.* 11 ed. 436, 437, marginal; Groves v. Slaughter, 15 *Pet.* 511.

IV. The transaction in the case at bar is commerce among the States. Is the carrying of passengers, freight and property, on the way from any State to another State, for *compensation* or *hire*, commerce? If it is, it is commerce among the several States, and cannot be regulated in any manner by State legislation.

1. Commerce is commercial intercourse between nations and parts of nations in all its branches. *Gibbons v. Ogden*, 9 *Wheat.* 191, *et seq.*; 2 *Story's Com. on Const.* 1057.

2. Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation or State, and selling to another, *and in transporting the merchandise from the buyer to gain the freight.* Passenger Cases, 7 *How.* 416.

3. Commerce is an exchange of commodities, and includes navigation and intercourse, and extends to the transportation of *passengers* and *property* for *hire.* Passenger Cases, 7 *How.* 401.

4. Suppose a cargo of cotton is shipped from New Orleans to New York, by way of the Mississippi river to Cairo, thence by the Illinois Central railroad to Chicago, and thence by lake or rail, is it a commercial transaction among the several States? It is admitted that no State can interfere with or regulate the master of the vessel, the vessel, the cargo or the freight, or the compensation or hire while on the river or lake. Can such State do any of these while it is on the railroad? The cargo, the carrier, the compensation are identical. It is one commercial transaction from the point of departure to the place of destination. Is any one of these less entitled to constitutional protection than another? Is it any less commerce among the several States on land

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than water? Is it the subject of State legislation in Illinois and not in Louisiana? Are the people of the one State to be permitted to regulate it, or compel the carrier to do so under heavy penalties, and those of the other to be prohibited from such regulation? Suppose it had gone by way of the gulf and ocean, would it be any more a commercial transaction between the citizens of Louisiana and New York, of two or more States. And is there any difference between the transactions, viewed in their commercial relations? Would there be any distinction between these and the shipment of a cargo, or a single article, produced or manufactured in the State of Massachusetts or Illinois, and sold by a citizen of either of those States to a citizen of Marshalltown, Iowa, or of San Francisco, California, whether carried by land or water, or partly by one and partly by the other? Is one to be free from State interference or regulation, and the other to be regulated by the laws of every State through which it passes? Is the carrier to look only to the laws of Congress and of trade for his government and rights in the one case, and in the other bound to consult the local statutes of half the States in the Union for these, and run the hazard of incurring oppressive penalties in each of them? These are stubborn questions, and the answers to them necessarily settle the character of the transaction involved in this suit to have been a commercial transaction among the several States, subject alone to the exclusive regulation of Congress. The idea that one transaction is commerce among the several States, on which the States may legislate, and that the other is not, and subject to State action, or that as to part of one transaction it is commerce on which *some States cannot act*, and as to another part of the *same transaction*, it is something without name, subject to the *regulation of some other States*, is so at variance with reason and common

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sense, that it would only dignify it to pronounce it absurd.

V. The statute is not a police regulation.

1. The statute cannot be sustained on the ground that it is merely a police regulation, because police regulations are, in their very nature, *local*, confined to the States enacting them, and can have no force or operation beyond those things which are purely internal to such State. If they extend to or affect a commercial transaction between two or more States, or the citizens of two or more States, they so far cease to be police regulations, and become regulations of commerce among the several States, and in conflict with the power of Congress over that subject, and with the regulations which Congress has wisely seen fit to provide for its protection and government.

2. Police is the due *regulation and domestic order* of the kingdom, whereby the *individuals of the State*, like the members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive. 2 *Blacks*. 162, marg.; see, also, *Bour. Law Dic.* Justice BALDWIN, in *Groves v. Slaughter*, 15 *Pet.* 511, gives the true distinction between police regulations on the part of the State, and commercial regulations among the several States, by Congress, that is: police relates only to the *internal concerns* of one *State*, and commerce within such State is purely a matter of internal regulation, *when confined to those articles which have become so distributed as to form items of the common mass of property in the State*; but any regulation which affects the *commercial intercourse between two or more States*, or the citizens of two or more States, is within the powers *granted exclusively* to Congress, while those regulations which affect commerce carried on *within* one State, or which refer only to subjects of *internal police*,

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are within the powers reserved to the States. See, also, 7 *How.* 422, *et seq.*, and the License Cases, reported in 5 *Id.* 504. In this latter case there was no opinion pronounced by the court, but each justice gave his own reasons for affirming the decisions of the State courts, the sum of which was, that in these cases the State laws did not operate upon commerce *authorized* by any law of Congress; that they were in the nature of police regulations for the protection of the *health* and *morals* of the citizens, and to prevent pauperism and crime within the States, having no force or effect beyond the internal concerns of such States; that if there had been any law of Congress authorizing the introduction of gin from Massachusetts into New Hampshire, then the statute of that State could not be sustained. While on these cases, we cannot forbear a particular reference to the opinion of Chief Justice TANEY, than whom there has been no stronger advocate of the right of the State to exercise concurrent powers over commerce. He says, on page 574, that a law of Congress, regulating commerce with *foreign* nations and among the several States, is the supreme law of the land; and on the same page, and following, in reviewing the decision of the court in *Brown v. Maryland*, he says the court *held*, that an *article authorized by law of Congress to be imported, continued to be a part of the foreign commerce of the country while it remained in the hands of the importer, and that no State could, directly or indirectly, impose any burden upon the importer or the property imported beyond what the law of Congress had imposed*; that he argued that case on behalf of Maryland and maintained that the State law was valid and constitutional, and persuaded himself at the time he was right, and that the decision restricted the power of the State more than a sound construction of the constitution warranted, but that *further and more mature reflection* had convinced

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him that the rule then laid down by the court was *just* and *safe*, and the *best* that could have been adopted for preserving the rights of the United States on the one hand and of the States on the other, and preventing collision between them. These admissions are important for us, coming as they did from one who was ever jealous of "State rights" when in collision with federal authority, and completely refute his own views of the extent of the federal power over commerce among the several States, which is, as he admits, co-extensive with that over *foreign* commerce, and it must be conceded the States cannot, in any event, regulate the latter, and certainly they can no more the former.

It is so apparent that the Iowa statute cannot be sustained as a police regulation, so far as it affects a commercial transaction between the citizens of Illinois, or Massachusetts, and the citizens of Iowa, as in the case at bar, that we crave the pardon of the court for citing any authorities upon the subject.

3. Nor can the statute be sustained because certain States have regulated pilotage, for they derive all authority for that purpose from the laws of the United States. See § 4, Act August 7, 1789, 1 *U. S. Stat. at L.* 54; also *Cooley v. B. of W. of Phila.*, 12 *How.* 317.

4. The Iowa act, if applicable to the case at bar, applies as much to the whole line of the defendant's road as to any part of it, to that part in Illinois and Wisconsin as well as in Iowa, and to the freight or compensation earned in another State as to that earned in Iowa; and this is the construction put upon it by the plaintiff, since he claims for an overcharge on the whole carriage from Chicago, Illinois, to Marshalltown, Iowa, and very singularly alleges that the defendant *had posted its rates and classification at all its stations and depots in Illinois and Iowa, save only Marshalltown.*

5. If the statute applies to any part of the freight

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carried from Boston, Massachusetts, or from Chicago, Illinois, to Marshalltown, Iowa, so as to fix the liability in this action, it must be held, as plaintiff claims, to apply to the whole freight earned, and if such construction as this be given to the statute it certainly cannot be sustained.

6. The goods themselves, and everything pertaining to their transportation, including the compensation, was commerce between two or more States; and as such was not subject to State legislation, in any of its branches, from the moment of consignment until fully delivered to the plaintiff, and the carrier had received its compensation for the carriage—the payment of freight in all commercial transactions being a condition precedent to delivery.

Boardman, Brown & Williams, for the appellee.

BECK, J.—Section 2, chapter 169, acts of the ninth general assembly, is in the following words: “In the month of September, annually, each railroad company shall fix its rates of fare for passengers and freight, for transportation of timber, wood and coal, per ton, cord, or thousand feet, per mile; also its fare and freight per mile for transporting merchandise, and articles of the first, second, third and fourth grades of freight, and, on the first day of October following, shall put up at all stations and depots on its road, a printed copy of such fare and freights, and cause a copy to remain posted during the year. For willfully neglecting so to do, or for receiving higher rates of fare or freight than those posted, the company shall forfeit not less than one hundred dollars nor more than two hundred dollars to any person injured thereby and suing therefor.”

The petition claims to recover the penalty provided by this section for several cases of alleged overcharge

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upon merchandise transported upon defendant's road ; for the penalty imposed for willful neglect to post copies of rates of fare and freights, which, it is alleged, defendant omitted to do, and for certain sums overcharged by defendant for the transportation of the merchandise in the cases where the penalties are sought to be recovered. The defenses pleaded are a general denial of the causes of action, and that the statute authorizing the recovery of the penalties is in conflict with the constitution of the United States, and therefore void. To the defense last named a demurrer was sustained by the court, and the ruling thereon is made one of the grounds of the assignment of errors. Other questions are presented arising upon the admission of evidence, and instructions to the jury, given and refused. The questions thus raised will be determined in the order in which they are presented for our consideration in the brief of defendant's counsel.

I. It is insisted that if plaintiff may recover the penalties for which he has brought suit, he is entitled to them alone, and cannot recover the amount charged in excess of the rates fixed by the defendant. "An overcharge before the passage of the act was attended with no other consequences than liability to pay it back. . . . Now that the statute has provided a penalty for the act, the penalty only can be enforced." Such is the language of defendant's counsel used in stating their position. The act in question is not intended to deprive the owner of merchandise—the injured party—of any right ; neither is the penalty imposed intended as a compensation to him for loss or damage sustained by the act of the railroad. It is intended, as all other penalties, to deter those who may come under the terms of the act from violating its provisions, and is in the nature of a forfeiture, for an illegal act done, to be recovered at the suit of the party injured. Before the act in question, as is admitted by

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defendants' counsel, in case of overcharge the railroad would have been liable for the amount wrongfully collected. If the act takes away no right of plaintiff he may still recover it. The recovery of the penalty and overcharge will not be in the nature of a double punishment. The recovery of the overcharge is no punishment at all; it is for a sum justly due plaintiff, and therefore defendant is required to pay it. The penalty is the punishment for defendant's wrongful act. If counsel's views are correct, violations of the law, when more than two hundred dollars of overcharge are collected, would present cases where the law could not be enforced without gross injustice. If the penalty is recovered the offending party would be acquitted of liability for the overcharge, and would thereby be a gainer by his violation of the law. If the overcharge is collected he could not be prosecuted for the penalty. In such cases the law would be practically defeated, and an inducement held out for great offenses against it. The authorities cited by defendant's counsel in support of his view apply to criminal cases.

II. It is claimed that the alleged overcharges were voluntarily paid, and, therefore, cannot be recovered in this action. The principle of law here announced need not be examined. The question of fact involved was for the jury to determine; we are unable to say that it was not correctly determined by them. Another principle of law is applicable to the case, and must be noticed in this connection. If the payment was made by plaintiff in ignorance of the rates which defendant was permitted to charge, he could recover. There was evidence tending to prove such ignorance, and thereon that fact was determined, we cannot say improperly, by the jury. There were no instructions given or refused upon these points, and we can only consider them as we have, in connection with the objection made by de-

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fendant, that the verdict of the jury is contrary to the evidence.

III. It is next insisted that the verdict of the jury is not supported by the evidence. The principal reliance of defendant's counsel to support this position is in the fact, as he claims, that the evidence does not establish that the overcharges were made, and the posting of the rates neglected by defendant, *willfully*. The peculiar language of the statute will be noticed. The word "willfully" occurs in declaring the forfeiture to be enforced. Willful neglect in posting the rates is a cause of forfeiture. Receiving higher rates of fare or freight than those posted is another cause of forfeiture, but it is not prescribed that this last act must be done *willfully* in order to incur the penalty.

It is said by defendant's counsel that the word "willfully" implies the idea of malice of a mild kind, an evil intent without excuse. Such may be its meaning in indictments and criminal statutes. But it is not to be so understood here. The word means "obstinately, stubbornly; with design; with a set purpose," and this definition must be applied to it where it occurs in the statute under consideration. If defendant "with design or with a set purpose," and not through mistake or inadvertence, omitted to post the rates, liability thereupon attaches for the omission. This is the plain meaning of the law. There was evidence tending to prove the omission to post the rates "by design"; the fact was one for the jury and not for the court, for it is an ingredient in the transaction—a fact which goes to establish defendant's liability. The verdict of the jury, in view of the evidence upon this point, as well as upon all of the facts of the case, is sufficiently supported.

IV. A drayman who delivered the goods carried by defendant to the plaintiff was authorized by defendant's agent to collect the charges thereon. When the goods were delivered, the plaintiff, as he states in his

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testimony, informed this drayman that he thought the freight was too high. The evidence as to plaintiff's declaration was objected to and is now assigned as a ground of error. It is claimed that, as the party to whom the declaration was made was not the agent of defendant, it could not be considered as a protest or objection to the amount demand. If it was proper for plaintiff to object upon paying the charges, the objection could be made to one authorized to recover them. The evidence, in our opinion, was competent as showing a fact connected with the payment of the overcharges which may be more or less important.

V. It is claimed by defendant that the court instructed the jury that plaintiff could recover a portion of charges upon the goods advanced by defendant to others. No such claim is made in the petition, nor do we find in the record any evidence bearing upon it, and it is not made to appear that any such claim enters into the amount for which the verdict was rendered. The instruction, if given, was error without prejudice. Plaintiff's counsel claim that this instruction appears in the abstract by mistake. This seems a reasonable explanation, as it is utterly inapplicable to the case made by the pleadings and evidence.

VI. The last point made by defendant is, that the statute under which the penalties are recovered is in conflict with the constitution and laws of the United States, in that it seeks to regulate commerce among the States, a power conferred, by the constitution, upon Congress (article 1, § 8), and exercised by that body, so far as commerce by the means of railroads is concerned, by the act of June 15, 1866. It is unnecessary to enter further into the question here presented than to inquire whether the act of the general assembly of this State, which is under consideration, does, in fact, attempt to regulate or interfere with commerce.

The statute will first receive our attention, in order

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to determine its operation and precise effect upon the railroads of the State. It provides: 1st. That, in the month of September of each year, railroad companies shall fix rates of fare for passengers, and charges for the transportation of merchandise; and, on the first day of October, shall post, and cause to remain posted, a copy of such rates, at all its stations and depots. No attempt is here made to regulate the charges of the incorporations for the transportation of merchandise or passengers, nor is there any thing in the provision which can in any way operate to interfere or prevent the free exercise of the business of the company. It contains no prohibition of the transportation of passengers or the merchandise of the country, nor are any rights of the corporation, as public carriers, curtailed. It is a simple requirement that there shall be certain charges fixed by the company for services rendered by it. It is stated, as an objection, that the statute requires charges to be uniform, so that merchandise must be carried for short distances at proportionately the same rates as are charged for greater distances. Without intimating that this may not be done by the legislature, we are clearly of the opinion that it is not attempted in this act. A cursory glance at the statute will be sufficient to sustain our view. The provision is that the charge shall be fixed at a certain rate per mile. It appears to us that it is perfectly competent for the company, under this act, to fix a certain charge per mile for merchandise from Clinton to Council Bluffs, and a different rate from Clinton to Cedar Rapids. The objection, if at all tenable, has no foundation in the act itself.

We will consider for a moment the reason and object of this statute. Its design is to protect the citizens of the State from impositions in the way of overcharges by the agents and officers of the railroads, acting under the authority of the corporations. In no business,

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fairly and honestly conducted, will one man or one class of men be charged for commodities received by, or services rendered to them more than another man or class of men. Among honest men this is not allowable, and no private citizen would long retain the patronage of the people who indulged in such discriminations. It is contrary to all right ideas of fairness and honorable dealing in business affairs, and is, in fact, a kind of oppression and injustice repulsive to all men. In the case of railroad corporations, that monopolize the carrying business of vast regions of country, if indulged in, the practice would result in great oppression and loss to the people. To correct such abuse if it existed, or to prevent its introduction, the statute in question was enacted. After the rates are fixed by the corporation, it is very plain that, in order that the people may receive the full benefit thereof, they must be published. If fixed and kept private no benefit could accrue to those doing business with the railroads. The provision requiring the posting of the rates is necessary to effectuate the purpose of the legislature in the enactment of the statute. Unless some sanction is provided for by the law, the duties imposed would not be observed, hence the penalty provided in the act for its violation.

Do the provisions of the statute attempt to regulate commerce? The word "commerce," in its general sense, means "an interchange or mutual change of goods, wares, productions or property of any kind, between nations or individuals, either by barter or by purchase and sale; trade; traffic." *Webster Dic.* But, adopting the definition given it in its connection as used in the constitution of the United States, it also means intercourse and navigation. *Story on Const.* §§ 1061, 1062; *Gibbons v. Ogden*, 9 *Wheat.* 189; *Passenger Cases*, 7 *How.* 276; *Brown v. Maryland*, 12 *Wheat.* 419; *Mayor of New York v. Miln*, 11 *Pet.* 102. We may concede for the purpose of our argument a

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proposition, which we do not decide, namely, that the transportation of property and persons from State to State upon railroads, constructed and owned by private corporations, is, within the meaning of the term, "commerce."

Admitting, then, that the transportation of property by railroads is commerce in the sense the word is used in the constitution of the United States, does the act in question attempt to regulate it?

As we have seen, it in no sense interferes with the business of the roads, or places any restriction or impediment upon the free transportation by railroads of either property or persons. They are forbidden to carry no kind or character of goods or persons; the time and place, and when and where they should receive and deliver whatever they transport, is not interfered with; the terms, conditions and circumstances under which they shall transact their business are in no manner provided for; in short, transportation upon these roads is just as free, just as untrammelled, as it was before the act. The *transportation* itself by these roads is, in no sense, regulated. The regulations of the act extend to the prevention of abuses, injustice and oppression toward the people, resulting from the unfair and unlawful practices of the agents and officers of the corporation or of the corporations themselves. It is intended simply for the protection of the people of the State, and in its practical operation has no other effect; and in this view is a police regulation indisputably within the scope of the authority of the State government. If the State may rightfully prevent, by fit legislation, railroad corporations from destroying the property of its citizens through the negligent acts of their servants, and provide penalties to be imposed for such acts, may it not interpose its authority to protect the people from greater losses by fraudulent and unfair dealings of such servants or of the corporations

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themselves? If the most insignificant municipality within the State through which a railroad runs may prescribe the rate of speed to be run by the cars of the corporation engaged in the business of transportation—in commerce, as we consent it may be called—for the purpose of protecting the property or persons of citizens, may not the State so legislate as to prevent fraud and impositions by the corporation or its servants? It would be strange, indeed, if the State, to whom the people look for the protection of their private rights and the security of property, is powerless, as against these corporations that owe their very being to charters derived from State legislation, to prevent loss and injury to citizens by fraudulent and unfair dealing.

It appears to me a reasonable view, though I do not remember to have seen the thought elsewhere suggested, that no State legislative act will be considered obnoxious to the provision of the constitution of the United States, in that it in effect regulates commerce, unless it in some way interferes with the freedom of commerce, or abridges the rights of those engaged therein. In this view the statute under consideration is unobjectionable. As we have seen, it in no way interferes with commerce; it deprives those engaged therein of no rights. It cannot be said that railroad corporations have a right to deal unfairly, fraudulently and oppressively toward those who patronize them. And this is all they are prevented doing by the statute in question.

As we have before intimated, the law in question is founded upon the authority of the State to establish all proper police regulations necessary to preserve the peace, health, morals and property of its people, and to protect them from imposition and injustice. Such laws, while they may even affect commerce and operate upon those engaged therein, are not obnoxious to the constitution of the United States. Quarantine and

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health laws, under which vessels engaged in commerce may be delayed for weeks in completing their voyages, or cargoes may be seized and destroyed, and sailors and soldiers of the United States imprisoned and punished for their violation; municipal or State regulations for the landing, inspection and disposition of cargoes of vessels; laws prohibiting the landing of paupers or diseased persons, and requiring reports to be made to municipal or State authorities of passengers upon ship-board, and regulating the running of ferries largely engaged in transporting the merchandise and travel of the country—these, and many others of like character, all designed to promote public prosperity, and to protect the people in their health and morals, and to guard them from frauds, impositions and oppressions, are enacted and sustained under the police power of the States. The law of this State brought in question in this case, is purely a law of this character, and of its validity we have no doubt. The views above stated, in our opinion, are in accord with doctrines recognized by the United States supreme court. *Mayor, &c. of New York v. Miln*, 11 *Pet.* 102; *Gibbons v. Ogden*, 9 *Wheat.* 1; *License Cases*, 5 *How.* 504; *Brown v. Maryland*, 12 *Wheat.* 419; *Passenger Cases*, 7 *How.* 276.

We need not inquire whether Congress has exercised authority by enactment upon the subject of the statute in question, nor discuss other points made in support of the position of defendant's counsel, that it is in conflict with the constitution of the United States; as the views we have above expressed are decisive of the case, and demand the affirmance of the judgment of the circuit court.

Affirmed.

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COMPANY v. RAGSDALE.*46 Mississippi, 458.*

Railroad company—Common carrier. When goods are delivered for carriage to a railroad company the law implies a contract that they shall be safely, and within a reasonable time, transported and delivered at their destination. And nothing will relieve the company from liability for not complying with this contract save an intervening "act of God, the public enemy, or the act of the owner," or a special contract limiting their common-law liability.

Reasonable time. The law does not attempt to fix what shall be considered a reasonable time by a common rule. It must depend in each case upon the attendant circumstances.

If a railroad company, acting as a common carrier for hire, has a reasonable equipment for transportation of goods for ordinary purposes, and delay be caused by unusual press of business, or by an accident not amounting to an inevitable casualty, the company will not be liable for damages caused by the delay, if they have acted with reasonable expedition, care, and prudence under the circumstances. And a company is not bound to incur extraordinary expenses to procure means to forward freights, if they are fully supplied with means for forwarding them under ordinary circumstances, and the occurrences which render those facilities temporarily insufficient could not have been foreseen at the time the contract for carrying was made.

Measure of damages. A railroad company, like an individual, will be held responsible for such damages as may be the natural result of its act. If other damages are claimed for its act, special grounds for their allowance must be shown.

Same. In a suit against a railroad company for delay in delivery of goods intrusted to it for transportation, the plaintiff cannot be allowed to recover simply speculative damages.

Same: Duty of party injured. In such a case it was the duty of the plaintiff to have taken all reasonable means to lessen the amount of the damages sustained, and in like measure the burden attempted to be imposed upon the company.

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Error to the circuit court of Lauderdale county.

Facts sufficiently stated in the opinion.

S. A. D. Steele, for the plaintiff in error.—1. It was error to instruct the jury that if the boiler was taken to the depot of defendant company that amounted to a delivery.

These facts do not constitute a delivery unless appearing in conjunction with the further fact that the company was bound to receive it regardless of their ability to ship it, which we deny. *Angell on Carriers*, p. 108, § 125, and note.

2. Delay in the delivery of goods—ultimately delivered—is excused, where it occurred by reason of an accident, if it appear that the carrier used due diligence. The rule in such case is different from that where the goods are lost or destroyed. 2 *Redf.* 178, and notes; *Id.* 180; 2 *Pars. Cont.* 185; *Hadley v. Clark*, 8 *Term R.* 268; *Angell on Carriers*, 256, § 289, note; *Id.* 252, § 283, note; *Wilbert v. N. Y. & Erie R. R.*, 12 *N. Y.* 245. And the court erred in instructing the jury that the delay would be excused only by act of God or the public enemy.

3. The instruction asked for the defendant below, namely, that the company was not bound to use extraordinary exertions, or to incur extraordinary expense, to overcome the act of God, such as the rising river, was proper, and should not have been refused. 2 *Redf.* 181; 2 *Pars. Cont.* 185; *Parsons v. Hardy*, 15 *Wend.* 215; *Bennett v. Byram*, 38 *Miss.* 21.

4. In an action of assumpsit for breach of a contract punitive damages cannot be allowed, and the court should have given the instructions to that end asked on behalf of the defendant, particularly as the proceedings on trial and other of the instructions were calculated to mislead the jury as to this point.

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5. The measure of damages for delay in the delivery of freight is the difference in its value at the time it should have been and the time it actually was delivered, and not speculative profits that might have been realized. *Sedgw. on Damages*, 69. *Hadley v. Baxendale*, 9 *Exch.*, in which a rule apparently contrary to this was held, possessed controlling features, lacking in this case.

6. The value of the boiler was not proven, the witness called for the plaintiff below giving only the value of the boiler, with other property, at a time subsequent to its delivery. Consequently the jury had no basis on which to estimate damages.

7. The continued overflow of the river over which the boiler was to be passed was "the act of God," to overcome which the company was not bound to use extraordinary exertions or incur extraordinary expense. *Bennett v. Bryam*, 38 *Miss.* 21; *Bridden v. G. N. R. R.*, 4 *H. & N.* 487; *Parsons v. Hardy*, 14 *Wend.* 215; 2 *Redf.* 181; 2 *Pars. Cont.* 185; *Hadley v. Clark*, 8 *Term R.* 265; *Ang. on Car.* 256, § 289.

W. & J. R. Yerger, also for plaintiff in error.—By the rule of the common law, common carriers are made insurers of freight delivered to their charge, and of its safe delivery to the consignee. And they are relieved from this liability only by act of God, the public enemy, or by the terms of a special contract limiting their liability. 12 *Smedes & M.* 599; 1 *Id.* 279. In respect to the *time* of the delivery of freight, the carrier, in absence of a special contract, is only bound to deliver them within a reasonable time, and for the purpose of effecting such delivery to use ordinary skill and care. 1 *Jones (N. C.)* 211; *Great North R. R. v. Taylor*, *Law Rep.* 1 *C. P.* 385; 2 *Redf.* 180; *Wibert v. N. Y. & E. R. R.*, 19 *Barb.* 36; *Sipfold v. S. C. R.*, 7 *Rich.* 409; 20 *Wis.* 594; 28 *S. J.* 57; 32 *S. T.*

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94. If the immediate cause of the delay is the act of God, though the carrier may have remotely contributed to it, he will not be liable. 20 *Pa. St.* 171.

The liability of common carriers as insurers does not extend to the *time* of delivery of freight. *Bond v. M. S. B. Co.*, 1 *Jones (N. C.)* 211; *Parsons v. Hardy*, 14 *Wend.* 215; *Story on Bail*, 545 *a.* Also see 14 *Ill.* 156; 22 *Barb.* 278; 7 *Rich. (S. C.)* 409, and *Id.* 190. The contract of a common carrier in respect to the delivery of freights is that he will deliver them at their destination within a reasonable time, according to the usual course of business, with all convenient despatch. 2 *Redf.* 178, § 189; *Raphael v. Pickford*, 5 *M. & G.* 551; 6 *McLean*, 296; *Hill v. Humphries*, 5 *M. & S.* 123; *Favor v. Philbrick*, 5 *M. & W.* 358; *Story on Bail*, § 545 *a.*

What is a reasonable time depends on the circumstances of the case. *Nettles v. S. C. R. R.*, 7 *Rich.* 190; *Id.* 409; *Conger v. H. R. R. R.*, 6 *Duer*, 375; 18 *Law & Eq.* 577.

2. Admitting that the company was in fault in not transporting the boiler at the time, the damages are excessive.

It was the duty of the plaintiff to have caused the boiler to be sent by some of the other routes shown to have been available, and then charged the defendant with the extra costs of transportation, instead of resting supine and then attempting to make the company liable for the anticipated profit of its use. *Sedgw. on Dam.* 92, 373, 379, *et seq.*; *Miller v. Mor. Church*, 7 *Greenl.* 51; *Davis v. Fish*, 1 *Iowa*, 407; *Sober v. Dawson*, 7 *Pick.* 284; *Thomas v. Shattuck*, 2 *Metc.* 615; *Harden v. Dalton*, 1 *Carr & P.* 181; *O'Connor v. Foster*, 10 *Watts*, 418; 19 *Barb.* 36; 24 *Wend.* 304; 21 *Id.* 457; 11 *East*, 232; 2 *Denio*, 610; 3 *Gray*, 92; 1 *Cal.* 333; 38 *English Law & Eq.* 335; 17 *Mo.* 290.

In regard to contracts, a defendant is only liable for

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those damages which each party may be fairly supposed to have contemplated, at the time they entered into the agreement, as likely to result from it.

The early English and American courts generally concurred in denying profits on any part of the damages to be compensated, whether in cases of contracts or torts. *Sedgw. on Dam.* 57-69, and cases cited. The modern rule in this country seems to have established the rule in reference to profits to be this, that a party may recover, as a part of the damages sustained by him, those profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, which are part and parcel of the contract itself, entering into and constituting a part of its very elements, something stipulated for, and which are presumed to have been taken into consideration and deliberated upon before the contract was made and formed.

But profits or gains derivable from a contract, which are contingent and speculative in their nature, and dependent upon the fluctuations of the markets and the chances of business, such as the supposed successful operation the party might have made if he had not been prevented from realizing the proceeds of the contract at the time stipulated, are not to be taken into the estimate of damages. For, besides the uncertain and contingent issue of such an operation, in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their considerations at the time of the contract. Opinion of NELSON, Ch. J., in *Masterton v. Mayor of Brooklyn*, 7 *Hill*, 62; see *Fox v. Harding*, 7 *Cush.* 516.

On the subject of gains and profits to be recovered as damages, there has not been entire unanimity in the American courts, but the great preponderance of authority, and the reasons which should control in such

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cases, is decidedly in favor of the rule laid down in the well-considered and leading case of *Homer v. Wood*, 16 *Barb.* 386; *Horen v. Goodel*, *Disn.* 23; 11 *Barb.* 371; 2 *Greenl. on Ev.* § 256, and note 5, and § 261; 1 *Sneed*, 381; 33 *Vt.* 75; 21 *Id.* 289; *Reynolds v. Cox*, 11 *Ind.* 262; 18 *Mo.* 369; 33 *Conn.* 513; 1 *Gall.* 56; 3 *Humph.* 56. We think it will be found, in every case where profits have been allowed in a collateral enterprise, as damages for the non-performance of an existing contract, on which such collateral enterprise was dependent, and such profits were matters almost of actual calculation, and not merely speculative and contingent. The case of *Hadley v. Baxendale*, 9 *Exch.* 343, was that of a mill in England which had been long established, with a fixed and daily amount of custom, almost unvarying, which loss of said custom could be calculated almost to a dollar; and so with regard to the other cases in which profits have been allowed as damages. These are all unlike the present case, in which there is no basis of calculation of profits, and where all is pure matter of speculation.

W. P. Harris, for defendant in error.—It is not sufficient to show that the court below erred; it must appear very clearly that the party complaining was substantially injured by the error; otherwise, this court would find itself compelled to listen again and again, in the same cause, to discussions upon points which exerted no influence on the result.

In this case, it is obvious under the general issue, with special pleas held good, the defendant presented, in proof, the identical matters set up in the rejected pleas, and, in the form of instruction, obtained the enunciation of every proposition which he sought to obtain by his pleas. The error, if any, was cured in the court below.

It is every day's observation in the courts, that a

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perfectly good exception to the ruling of the court is taken, and yet rendered useless by being cured in the progress of the trial. This rational principle is as applicable to pleading as to evidence. *Wilkinson v. Cook*, 44 *Miss.* 367, and the authorities cited.

The instructions taken together present the true legal propositions. Looking to the evidence, it is apparent that the real issue was that of negligence or no negligence; that is, did the defendants use reasonable diligence? Could they, by the exercise of due diligence, have delivered the machinery at the time appointed or earlier than it was delivered? No one can read the evidence and the instructions without perceiving that this was the chief inquiry, indeed the only inquiry as to the question whether the plaintiff had a cause of action. The instructions on both sides must be taken as one connected utterance by the court. One instruction, too broad, is qualified by another which restricts it. Let us suppose that the court, under the old rule, which admitted of a general charge on the whole case, and it appeared in that charge that it started out with a proposition too broad, but in the course of it the error was distinctly corrected, and, taking it altogether, the case in point of law was fairly presented, we could not surely assign for error here the first broad proposition announced.

Let us put the instructions on both sides together into a connected charge. It will stand thus: "The rule as to common carriers is, that nothing but the act of God, the public enemy, or, as it is better expressed, nothing but inevitable accident, will excuse him for a failure to perform his contract. This general rule, however, has this qualification: if the breach of the contract or the failure of duty consists in mere delay in the delivery of freight, and not the loss of it, then the carrier will be excused if he shows that he used all due diligence in efforts to deliver in time." This prop-

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osition is actually conceded in one of the instructions for the plaintiff, and when we read those given for the defendant, we are struck by the broad and liberal basis on which the court placed the defense, and the repeated and distinct modifications of the first general proposition.

If instructions too broad, or bad altogether, are corrected, the error is cured. *Hanks v. Neal*, 44 *Miss.* 212; *M. & C. R. R. v. Whitfield*, *Id.* 466; *Head v. State*, *Id.* 731, and authorities there cited.

Let us not be carried away by citations showing that "contradictory instructions constitute error." It depends altogether upon the way the proposition stands in the cause. Here there is not contraction, but qualification of one proposition by another, and the peculiar manner of the qualification is the effect of the law which denies to the court the power to make a general charge of the law to the jury. The court, having before it the charges asked on both sides, finds an instruction asked by one side too broad or too narrow, or otherwise incorrect, but also sees in other instructions for the same party, or in instructions asked by the other, that the error is corrected, and the proper meaning of the legal propositions propounded evolved in the series of charges asked, and gives the charges altogether. The court will not alter a charge which is made to have its proper weight by other charges, and this effect is as well brought about by the instructions drawn by the counsel as by the mouth of the judge.

As to the matter of fact on the question of diligence, the testimony of Ragsdale is conclusive. This court cannot undertake to say about what degree of credit should be attached to the testimony of this witness. The jury has decided that he is worthy of credit, and from this decision there is no appeal. The jury had the right to take his statement against a "cloud of witnesses." He proves negligence. In addition to this,

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negligence is shown by other witnesses and facts which do not admit of dispute. The machinery was crossed over the pontoon bridge when the river was six hundred feet wide, and Theobold says that between the time of the arrival of the machinery and the time of crossing the machinery, the river had been at that stage "several times." It was, therefore, practicable to have crossed it "several times." Again, the defendants having induced Ragsdale to ship the machinery by their road, were bound to receive it and make every reasonable effort to transport it. They allowed the boiler to remain at Vicksburg a month or more before they sent it to the river or gave Theobold notice that it was to be crossed, and without consulting him as to the practicability of crossing it. If they had sent it forward to the river promptly, it would have enabled Theobold to take advantage of the first fall in the river, of the first of the several times when it is shown to have been practicable to cross it. The evidence shows that the company had an excess of freight of a lighter kind, and this being more profitable than the transportation of the unwieldy boiler, Ragsdale was sacrificed to interests of the defendants.

No objection was made to the evidence offered to show the extent of the damages, and accordingly it was shown that an engineer was employed at high wages, and buildings erected at great expense. The want of saw-mills at Meridian during the period the machinery was delayed, the great demand for lumber, its price during that time, the expense of running the mill, the product of such a mill if worked with reasonable diligence, and upon all this the jury were asked to fix the compensation for the injury occasioned by the inexcusable delay in the delivery of the boiler. Undoubtedly all these matters should have been weighed by the jury. Mr. Sedgwick has well remarked, that the difficulties which surround the subject of the

measure of damages is traceable in a great degree to the efforts on the part of the courts to adopt rules for all cases, and take the subject from the jury; that the case should be submitted to the jury and every actual loss considered by them under proper directions; and that the jury should be allowed to make a just allowance for compensation, taking the whole matter into view. It will not do to say profits are not to be considered, that consequential damages are not to be taken into this account, nor will it do to say that every actual loss, direct or proximate, should be compensated.

The case we have is governed by no conventional rule. It is not even to be governed by the rule as to delay in the delivery of merchandise. It belongs to a class of cases in which the courts have arrived at some general rules as to the measure of damages admitted to be sound as far as they go: delay in the delivery or erection of machinery or the repair of machinery.

The proposition which has universal acceptance is that a party who occasions loss by a breach of duty or contract must make good the loss. In the language of an English judge, the injured party ought to be placed, as near as can be, where performance of the contract would have placed him. There is no instruction given in stronger terms.

To these general propositions there are admitted qualifications: 1st. Where the damages are not the necessary and usual consequence of the injury, but grow out of a peculiar condition of things, or situation of the injured party, then it must appear that the offending party knew or was admonished of these circumstances, because, says the English court, in *Hadley v. Baxendale*, if the carrier had been told of the circumstances and the use for which the machinery was wanted, so that he might see the consequences of delay, he would have made a special contract to limit his liability, or at all events have seen the necessity of

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diligence. It that case the delay was in the delivery of part of the machinery of a steam mill, and the court held that the loss of the profits of the mill during the delay could not be estimated, because the carrier did not know that stoppage of the mill would result from his delay. *Hadley v. Baxendale*, 9 *Exch.* 841; *Sedgw.* 81. The intimation is clear that if the carrier had been duly notified that the mill could not run without the part he undertook to deliver, that the loss of the profits during the period of inexcusable delay would have properly entered into the estimate.

Hadley v. Baxendale has not been overruled. It is sound law, and Mr. Sedgwick has inserted it in his text by the side of *Griffin v. Collier*, 16 *N. Y.* 489, and the two cases are leading cases. Mr. Sedgwick has approved the Louisiana rule, which is but a deduction from the principle of the case, in 9 *Exch.* (*Sedgw.*) 67, 79, 80. See *Hinckley v. Beckwith*, 17 *Wis.* 413. The American leading cases differ from the English in not holding it to be necessary to show that there was actual notice to the carrier of the consequences likely to follow delay in the delivery, but it was in a case where the party contracting to deliver of necessity knew that the delay suspended operations. As in this case, the carrier must have known that the engine could not operate without the boiler. It may, therefore, be taken as a sound rule, that, where the damages are the direct result of the delay, they are to be estimated in all cases, with the qualification that, if there be unusual and peculiar circumstances, which would enhance the damages, the carrier should be admonished of their existence.

Thus we have one qualification of the leading proposition. The next is that stated in *Griffin v. Collier*, which is that where you undertake to make the loss of profit as a measure of damages, or other consequential damages are estimated, there must be cer-

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tainty that the damage resulted from the breach of contract, and reasonable certainty as to the extent of the loss. There must be some known standard, approximating to certainty, as to the loss. The American cases of delay in delivering machinery, whereby the operation of a mill is suspended or prevented, give damages for the value of the use of the mill, the expense of preparations, &c. *Griffin v. Colver*, 16 *N. Y.*; *Priestly v. North. Ind. & Chicago R. R. Co.*, 26 *Ill.* 205; *Davis v. Cin., Ham. & Dayton R. R. Co.*, 1 *Disn. (Superior Court of Cinn.)* 23; several cases in the Indiana and Illinois reports. The value of the use of the saw-mill during the period of inexcusable delay, together with the actual expenditures of the money occasioned directly by the delay, are to be estimated.

How are we to determine the value of the use of a saw-mill at Meridian for a period of three or four months? In New York and the West, where mills are abundant, and the leasing of mills is a common thing, the price of such leases are governed by a standard hardly less certain than that which governs the lease of land and the hire of labor. At Meridian, however, such a thing as leasing a saw-mill, I suppose, rarely occurs, and witnesses and jurors would be at a loss to say what it would cost to rent a saw-mill with lumber at a high price, for three or four months. The value of the use of a mill is, at least, the value of the net product, and no man undertakes to lease a farm or a mill without basing his estimates upon this product. In the case in hand this was consistent with principle, and, in fact, merely adopting the real standard of value, there being no market value fixed by the business of the country. We do not know what standard or measure of damages the jury actually took. The evidence admitted of their adopting the standard of actual loss by the decline in the value of mills. What cost seven thousand dollars, Ragsdale had to sell at four thousand dollars, estimat-

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ing actual expenditures, and the value of the use tested by the product which might reasonably be anticipated.

Here is a case in which an enterprise has been defeated. Hence a case where a man has embarked money, devoted his energies and his time in a project which offered rational inducements, and afforded ground for rational hope, he is thwarted and disappointed by the negligence of the defendant. It is plain he sustained a loss, a heavy loss, by this negligence. He estimated it at twelve thousand dollars. The jury gave him one-fourth of that sum. His actual, ascertained loss, that is, the cost of what he sold, as compared with the price he got, amounted to three thousand dollars, and if we estimate expenditures, and the value of the lease of the mill, it will reach that sum. That he is entitled to compensation for these losses is plain, and the law which would condemn a verdict for three thousand dollars would condemn a verdict for one thousand dollars, nay, for one hundred dollars. The court must, if it upsets this verdict, give a reason for it. If it was wrong, wherein was it wrong? If the wrong measure has been used, give the right measure. When this is attempted, the court will find it very difficult to fix upon any standard which will be more satisfactory than that which the jury seem to have adopted. The suggestion that Ragsdale should have shipped his boiler by way of New Orleans, is met by the fact that the defendants invited him to send it by their road, and kept him constantly fed with the hope that it would be sent forward.

SIMRELL, J.—This is a suit by Ragsdale against the Vicksburg and Meridian Railroad Company, as common carriers, for a failure to transport from Vicksburg to Meridian, a boiler, part of the machinery of a steam saw-mill, within a reasonable time. The count is upon the duty (or implied contract) of the carrier to perform

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his undertaking with due dispatch, and alleges for breach a failure to perform. We have been greatly assisted by counsel, with elaborate argument at the bar, and with copious briefs. When property is delivered to a carrier the law implies a contract, that it shall be safely, and within a reasonable time, carried to, and delivered at, the place of destination. Nothing relieves from the obligation to deliver, except the act of God, the public enemy, the act, or conduct of the owner, or a special agreement limiting the common-law duty, if the time is not named. The implication arises from the receipt of the property for transportation ; that it shall be done with due dispatch, or within a reasonable time. The law does not attempt to fix by rule, what is "a reasonable time." Each case is referred to its own peculiar circumstances, an account being taken of the mode of conveyance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities for transportation under the control of the carrier. Temporary interruptions or obstructions, which could not with ordinary prudence be provided against, excuse "delay ;" but do not absolve from the duty to carry and deliver as soon as it becomes practicable. These principles are well settled, and have received a full recognition in *Bennett v. Byram*, 38 *Miss.* 20. There the transportation was impeded in mid-voyage by low water. Not being able to prosecute the voyage, the carrier stored the goods at Gainesville in June. In August the owner hauled the lighter goods to Aberdeen. In the following January the river became navigable and the heavier articles were forwarded by steamboat. On these facts it was held, that the carrier was justified in suspending his voyage and storing the goods ; that the owner could not recover for the expense of the hauling, because by accepting the goods he discharged the carrier from further responsibility with respect to them ; as to the delay, that was refer-

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able to inevitable accident. *Ang. on Car.* §§ 330, 331.

The principles which measure the duties and responsibilities of common carriers prevailed before steamboats and railways came into use. With very few modifications they have been applied to these modern facilities of commerce.

The questions are reduced to these: 1st. Was the railroad company excused in the delay of carrying and making delivery by an extraordinary event, and did it exert reasonable dispatch in all the circumstances? 2nd. If the default of the company was established, is the verdict of the jury excessive? and, lastly, did the court, by granting or withholding instructions, contribute to a wrong result?

It was not controverted at the argument that the destruction of the bridge over the Big Black, and the unusual floods in that stream from about the first of January until June, was such a hindrance to the operations of the railroad as necessarily to produce delay, more or less, in its business of transportation.

For the plaintiff it was maintained that the company, by the use of energy and diligence, could have crossed the boiler over the river, on the pontoon bridge, or the steamboat, or by other means. The evidence is clear and full that these accommodations were ample for all ordinary purposes, in any stage of the water, were sufficient to cross any freight that had been offered, except the boiler, and would answer for that when the water did not exceed six hundred feet in width, and that the boiler was the only freight which was not promptly crossed, and that was held back on account of its great weight (eight thousand five hundred pounds).

If the company have a reasonable equipment for all ordinary purposes, and the delay be occasioned by an unusual press of business, but the carrying is done

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with reasonable expedition under the circumstances, then it is not responsible for the delay. 2 *Redf. on Rail.* 163, § 2; *Peet v. Ch. & N. W. R. R. Co.*, 20 *Wis.* 596. Nor will the carrier be responsible if the goods are retarded by an accident not amounting to an inevitable casualty, if due care and diligence have been used. *Story on Bail.* § 545; 14 *Wend.* 215; 20 *Wis.* 596.

Nor was this company bound to incur extraordinary expenses to procure a means specially to cross this boiler, in view of the fact that it had facilities for doing so in ordinary high water, and such contingency may not fairly have been anticipated when the contract was made; and in view of the further fact that neither party could have foreseen or anticipated a stage of water higher, and remaining up longer, than was usual in that stream.

The damages alleged in the declaration are "depreciation in value and the loss of the opportunity of selling;" privation of "gains and profits," and expenses in endeavoring to obtain the goods. The rule is, that such damages as may be presumed necessarily to result from the breach of contract need not be stated, but if other special damages are claimed they must be specifically stated. 1 *Chitty Pl.* 386; *De Forest v. Leet*, 16 *Johns.* 122.

On a very large class of contracts, there is no serious difficulty in assessing the damages for a breach, according to a definite rule. As where goods are for sale at the place where the carrier undertakes to deliver them, there the measure is the value at the place of delivery, as compared with the place of receipt by the carrier. If they have been unreasonably delayed, the time when they ought to have been delivered is, perhaps, the criterion. Much depends, too, upon the character of the property, as whether liable to waste and deterioration by time. The cardinal principle is that the party in default shall make full and complete satisfaction.

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The difficulty arises in determining what elements that contribute to the injury shall be taken into the account. What is the line which separates damages that naturally and necessarily flow from a breach, from those which are more remote and speculative? A party may fairly be held to account for the ordinary results of his act. It is upon this idea that compensation for private wrongs is computed. If more than this is claimed, a special reason, or ground for it must be shown. (We are not speaking of those cases of bad faith, &c., where damages may be allowed.) There is nothing in this case which warrants such damages. It is not pretended that the delay was wanton, or was dictated by a gross dereliction of duty. At the most, it amounts to an error of judgment, as to the ability of the company's agents to put the boiler across the Big Black before it was done. Ragsdale, therefore, was only entitled to be fully and adequately compensated for his losses, computed upon proper principles. The boiler was a part of the motive power of a saw-mill, intended to be erected by the plaintiff. The delay in its transportation and delivery entailed a loss upon him, but to what extent, and upon what basis is the calculation to be made? No well-considered case can be found in the books, where speculative profits, to be made out by calculations upon paper, are allowable. In *Masterton v. Mayor of Brooklyn*, the profit which would have been derived from another contract, existing at the making of the one in suit, was allowed. 7 *Hill* (N. Y.) 62. Here there were data for a safe estimate. The reason for discarding expected profits as an element of loss is, that the party charged is not presumed to have made his contract with reference to such results. But where they are such as he ought to have contemplated as a reasonable and probable result of the breach, they may be considered. But then the anticipated profits should be such as are capable of reasonable certainty.

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In *Abbott v. Gatch*, 13 *Md.* 333, the bargain was to build a flouring mill by a specified time. On failure to complete within the time, the plaintiff claimed for the profits which he would have realized from the business. This was repudiated as too uncertain and contingent, and the rent or value of the use, as of rental, was adopted, not because it was a certain criterion, but for the reason that it was approximately just. Mr. Powell, in his treatise on contracts, chapter 21, states the general principle thus: "Such damages as are incidental to and directly caused by the breach, and may reasonably be presumed to have entered into the contemplation of the parties, and not speculative profits or accidental or consequential losses." To this formula may be reduced the case of *Hadley v. Baxendale*, 9 *Exch.* 341, and *Hamilton v. McPherson*, 28 *N. Y.* 76. In the last case the carrier was attempted to be held for injury caused to grain by heating after he had received the notice to forward it. He was guilty of negligence in the delay. The "damage" was not incidental to and caused by the delay. The direct cause was "want of care in the warehouse;" he was, therefore, not liable for injury by the heating.

In *Palmer v. Ohio and Mississippi R. R. Co.*, the effort was to secure the profits which would have been made in building Sipton locomotives, which were to be paid for as completed; five were constructed and delivered, and the contractor suspended work because he was not paid for those finished. He failed because no case, said the court, could be found to that effect, "unless the plaintiff had been prevented from going on with his work, by the positive affirmative act of the other party, or unless the other party has neglected to do some act without which the plaintiff could not, in the nature of things, go on with his contract, as where the place for the erection of the house is not pointed out, or materials not furnished as agreed

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to be." *Ashe v. De Roset*, 5 *N. C.* 301. Rice was burnt in a mill where it had been deposited to be hulled; the miller was guilty of negligence in delaying the work, but was not responsible for the value of the rice, because the contingency of its destruction by fire was not in the contemplation of the parties. It was not a natural and incidental consequence of a breach of the contract.

In all the cases we have examined, if extraordinary special damages, such as the loss of profits in a business, are allowed, they must have been incidental to the breach, in such sense as to have been contemplated by the parties at the time the contract was made. Thus, in *Smead v. Foord*, 1 *Ellis & Ellis*, 602, in the queen's bench, the delay was in the delivery of a threshing machine, with the knowledge that it was needed to thresh grain in the field. The wheat was injured by rain, and a further loss was sustained by a fall in the market. It was held that damage by rain might fairly be supposed to have been contemplated, but that a decline in the market was too remote and contingent. *COMPTON, J.*, said that the rule in *Hadley v. Baxendale* "must not be extended." In *Wilson v. Newport Dock Co.*, 1 *Law Rep.* 177, *MARTIN, B.*, who participated in the judgment of *Hadley v. Baxendale*, observing on the case, said, that while the observations of *ALDERSON, B.*, were proper to be taken into consideration, in the great majority of cases performance was expected, and damages to arise from a breach seldom or never entered into the contemplation of parties. In *Gee v. Liverpool and York R. R. Co.*, 3 *L. T. N. S.* 322, it was said by *Baron WILDE*, that a most excellent attempt had been made in *Hadley v. Baxendale* to lay down a general rule of practice, but that in many cases of contracts there was no fixed rule, and as yet it had been impossible to find one. In that case the "delay" was in the delivery of some bales of cotton at Oldham; in

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consequence the mill was idle, and workmen unemployed for a time. The immediate need of the cotton was not communicated to the carrier, at Liverpool, but was communicated on non-arrival in proper time. It was held, that for the lack of notice at the time of delivery to the carrier, he could not be liable for stoppage of work and wages of operatives. So in *Great Western R. R. Co. v. Redmayne*, 1 *Law (C. P.)* 329. The plaintiff lost the sale of his goods through the negligent delay of the carrier, who had received no notice of the object for which the goods were sent; this special damage was disallowed. In *McKnight v. Ratcliffe*, 44 *Penn. St.*, a stream was obstructed which caused the overflow of plaintiff's coal mine, depriving him of its use for four months. The supposed profits which might have been made were rejected as measures of damages."

In *Cooper v. Young*, 22 *Ga.* 272, delay was made in the delivery of coal to the plaintiff, who was a smelter of iron out of crude ore. His works were suspended for a time, and the question was, whether he could recover for the loss of profits which he would have made, or the enhanced cost of transportation by some other mode. It was determined by the court, that, as the carrier had the cheapest mode of transportation, the price agreed upon as usual by that mode, and the terms upon which others would carry by other modes, also, expenses of wages of hands during necessary suspension until the plaintiff could, by other means, supply himself, were the proper elements in fixing damages. A party subject to injury from breach of contract is under duty to make reasonable exertions to reduce his damages as much as practicable. If he, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss should justly fall upon himself. *Frelander v. Pugh*, 43 *Miss.* 117, and cases cited; 21 *Wend.* 461;

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17 *Pick.* 284. Where the goods are for resale in the market of destination, and so known to the carrier, the carrier, if guilty of negligent delay, is chargeable with the enhanced price at the place of delivery, less his charges for freight. *O'Connor v. Foster*, 10 *Watts*, 418; *Sangamon & Morgan Co. R. R. v. Henry*, 14 *Ill.* 156. But where the goods are not to be put upon the market for sale, but are to serve a specific purpose in a business, this rule may not be, and often would not be, adequate to determine the damages. To delay in the carrying of machinery, in *Green v. Mann*, 11 *Id.* 613, it was said, the value of the use of the machinery was the criterion. In *Priestly v. North. Ind. & Chicago R. R. Co.*, 26 *Id.* 207, a "reasonable rent" was indicated. It is added, if the carrier had been notified for what purpose the machinery was designed, and its necessity, as that hands were under pay and idle, loss of promised custom out of which profits would have been made, these circumstances might have been considered of.

We have pursued this investigation to the point of tedium, in order to see the practical application of the rules for assessing damages. We are constrained to concur in the observation of Barons MARTIN and WILDE, that a splendid effort was made, in *Hadley v. Baxendale*, to state the principle in such form as to provide for the more difficult cases, but subsequent experience and discussions have tended to demonstrate that it is not possible, in the nature of things, to declare a fixed rule for many contracts. This much may be accepted as well settled: 1. The proximate and natural consequences of the breach must always be considered. 2. Such consequences as from the nature and subject matter of the contract may be reasonably deemed to have been in the contemplation of the parties at the time it was entered into. 3. Damages, which fairly may be supposed not to have been the necessary and

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natural sequence of the breach, shall not be recovered unless, by the terms of the agreement, or by direct notice, they are brought within the expectation of the parties. 4. Losses of profits in a business cannot be allowed, unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract itself, or by explanation of the circumstances at the time the contract was made, that such damages would ensue from non-performance. 5. If the contract is made with reference to embarking in a new business (such as sawing lumber for the market), the speculative profits which might be supposed to arise, but which were defeated because of a breach of contract which delayed the business, cannot be looked to as an element of damages. These are dependent largely upon contingencies, skill, industry, energy, the market, supply of material, keeping machinery in order, loss of time by weather, or breakage of machinery. 6. If the delay is in the transportation of machinery, to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means; the expenses of idle hands, the loss of gain on work contracted to be done for another person, if such work could have been done if the machinery had been delivered, and the gain thereby definitely ascertained in proper time. 7. The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses, and diminish the responsibility of the party in default to him.

The difficulty experienced by the courts is not so much in the abstract principles, but in their application to special circumstances, so multifarious and various in

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the transactions of actual life. The constituents of the "injury," as enumerated by Ragsdale, are these: That lumber from February to June was high and in demand, worth from thirty dollars to thirty-five dollars per thousand; money was also plenty. After June lumber depreciated about ten dollars per thousand, money became tight and scarce; besides this he had need of lumber for building purposes. He had made arrangements to run the mill night and day, whereby his profits would have been over one hundred dollars per day. He had hired an engineer at six dollars per day, for four months, who was idle half the time. He expended fifty dollars in looking after the boiler. The cost of his engine, machinery, mill-house, &c., was seven thousand dollars; after operating a short time, at a loss, he sold the entire establishment for four thousand dollars. From these circumstances the jury estimated the damages at three thousand dollars. It is perhaps impossible to analyze the premises upon which the jury proceeded. It is manifest that they ought not to have allowed for the supposed profits, which Ragsdale might have made. These were purely contingent and speculative, resting for their fulfillment upon the uncertainty of the market, the ability to supply logs, the skillful management of the machinery and business generally. They are repudiated in all the carefully considered cases we have examined. Nor does the price realized for the mill property supply a proper data. The value at the time of sale was influenced by the demand for such property, the profits in its use, and the condition in which the property itself was, as whether injured or not; chiefly, perhaps, in the market value of the product of such a saw-mill, at the time and place. It is because of the uncertainties and fluctuations of such standards, that the courts have found them unreliable and uncertain, and are, therefore, supposed not to have been contemplated by the parties at

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the making of the contract. The contractor, who engaged to supply the farmer with a threshing machine by a certain day, knowing the use it was to be put to, was properly chargeable for the injury to the wheat in the husks from rain, because, according to the economy of nature, the grain was exposed to that risk by his negligence. But not for a depreciation of the market value of grain. If Ragsdale were compensated for the value of the use of such machinery, while deprived of it by the negligence of the carrier, and also for the expense of idle hands, awaiting its arrival, and costs incurred in looking after it, and injuries to it because of delay, about all the circumstances are taken into the estimate upon which courts and juries can securely rely. There was no sufficient testimony before the jury, as to the value of the use of such property to enable them to act intelligently on that point.

At the time that Ragsdale had his interview with the servants of the company in December at Vicksburg, about their road as one of the routes for transporting his engine and fixtures, there was no serious obstruction from high water in the Big Black. But on February 1, when his engine and boiler arrived at Vicksburg, and was offered to the company, the water in that stream was very high. Mr. Crutcher (a member of the firm of Crutcher, Hazlett & Co., the consignees), states "that on February 1, when he applied to the clerk, at the company's depot, to see about shipping the boiler to Meridian, he refused to receive it on account of the difficulty of crossing it over Big Black. That he saw Lawrence (who was transportation agent or master) who also refused to receive it for the same reason." "He saw the clerk again, who permitted him to leave the boiler in the yard, for convenience, to be forwarded as soon as it could be crossed over the Big Black." "That the witness saw Ragsdale in Vicksburg the last of February, and informed him of the condition upon

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which the company had received the boiler for transportation," "and that he, witness, understood Ragsdale to assent to this arrangement." On the arrival of machinery from St. Louis the consignees had, by letter, informed Ragsdale of the difficulty of crossing the Big Black." These facts are worthy of serious consideration on the question of damages. They put the plaintiff in possession of the knowledge that the company's servants, charged with transportation, did not believe, when the freight was offered, that they could transport the boiler to Meridian, and that they had accepted it to be transported, when it became practicable. Three or more weeks afterward he is advised of this, and acquiesces in the arrangement that had been made. In view of the uncertainty of the transportation, and of his great need of the machinery, ought he not, in order to lessen his own losses and lighten the burden that might be upon the carrier, to have adopted one of the two other modes of transportation, either via New Orleans and Mobile, or via Columbus, Ky., and the Mobile and Ohio Railroad; either of which were open to him. The iron manufacturer, in the case reported in 22 *Ga.*, must suspend his furnaces unless he received coal from Chattanooga; there was none to be had elsewhere. Ragsdale could not start his mill without a boiler. The former was not permitted to close his works and charge the carrier with the profits he might have made. But he ought to have availed of a more expensive mode of transportation, and held the carrier for the difference. So Ragsdale could have sent his boiler by either of the routes indicated, and charged the company with the difference; for, thereby, he would greatly have shortened the time that he was deprived of the loss. These facts should be considered by the jury, in fixing the time that the company should pay for the privation of the use of the machinery; especially so, if the car-

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rier was acting in good faith, and delayed the transportation for the reason that he believed that it was impracticable to cross the swollen stream.

Was the jury correctly guided by the court, and can the plaintiff in error predicate that he has been injured by erroneous instructions? If the verdict is clearly right upon the testimony, and substantial justice has been attained, the appellate court will not remand the cause for misconception and misstatement of the law in the instructions, for the right result has been attained, in despite of the error of the court.

The first instruction granted for the plaintiff lays down the rule as to the responsibility of a carrier for a non-delivery, but not the rule for a "delay" in making delivery caused by negligence.

The second instruction is so vague and indefinite, when applied to the circumstances of this case, that it furnishes no guide at all, or turns them loose to frame such standards and rules for the measurement of damages as they chose to adopt. Considered in connection with the third, the jury were at liberty to give such contingent gains as the plaintiff might have made by a successful running of his mill, day and night, without loss of time from bad weather, disorder of machinery, or other contingency.

The seventh instruction may have misled the jury as to the amount and character of exertion the carrier should have made in overcoming the obstruction of crossing the Big Black. The refusal of the court to grant the defendant's eighth prayer of instructions, to wit: "That the plaintiff, for the non-delivery of freight in a reasonable time, is not entitled to speculative damages" still further tends to the impression that the jury may have been influenced by wrong views of the law on this point.

There is a want of harmony and consistency between the instructions granted for the respective parties on

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the question of "negligent delay;" besides, the court refused the eighth prayer of the defendant, which would have had the effect to limit and modify the second and third instructions given for the plaintiff, and to have made the rulings on this point more in harmony with the law.

We have not thought it worth while to consider the decisions of the court on the pleadings. The matters contained in the pleas were admissible under the general issue. In truth, all the testimony propounded by the defendant, all that was capable of being produced, went to the jury, and if he had the benefit of all defenses under the issues joined, and the testimony was admissible under them, no beneficial end would be answered by an examination of these decisions. We have purposely foreborne to express an opinion as to whether the railroad company was guilty of such delay in forwarding the boiler, in the special circumstances, as makes it liable to damages. It is the peculiar province of the jury to determine that question, aided by such expositions of the law by the court as will enable them to apply correct principles to the facts in evidence.

Judgment reversed, and *venire facias de novo* awarded.

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HANNIBAL RAILROAD COMPANY v. SWIFT.

12 *Wallace's Reports*, 262.

Railroad company, liability of as common carriers. The obligations and liabilities of a railroad company as a common carrier are imposed by law and not created, though they may be sometimes modified, by contract.

Same. It is the duty of a railroad company, as a common carrier of passengers and merchandise, to receive for transportation over its route, or any portion of it, all persons and their baggage, or merchandise, for the transportation of which application shall be made, unless some reasonable grounds for refusing to receive the same exists, and the company will be responsible for their safe conveyance to their destination or the terminus of the route.

Same. If any reasonable grounds should exist at the time of the application for transportation for refusing to receive and carry the passengers or merchandise, the company is bound to insist upon such grounds at the time if desirous of avoiding responsibility.

Same. If, having reasonable grounds for refusing, it neglects to insist upon them at the time, and receives the passengers and their baggage, or merchandise, knowing, or having free opportunity to know, the character and amount of the latter, it becomes responsible for their safe conveyance as if no objection to their acceptance had been originally possible.

Same. The liability of the company in such a case is not affected by the fact that the baggage, or merchandise, was placed in a car selected by the owner of the goods or by his own servants, and the company received the car packed and locked. Their liability arises from the fact that they did receive it. If they were not certain of its being securely freighted, they could, or should have learned then, or objected to taking it on that account.

Semble. It would make no difference if a car so selected, passed and delivered to the company, was placed under guard of the passenger's servants, so long as the management of the train or car by the company's employees was not impeded.

Baggage. The surgical instruments of an army surgeon are properly included as baggage when he is traveling with the troops.

Error to the circuit court for the district of Missouri.

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The case was tried below without a jury on a statement of facts agreed upon by the parties, of which the following is a sufficient summary.

The plaintiff was a surgeon in the army, and in the latter part of the year 1861 was traveling under orders with the troops to which he was attached to Cincinnati from a frontier port, which necessitated passage over the defendant's road from St. Joseph to Hannibal.

That portion of Missouri through which the road passed was at the time in a state of rebellion against the United States, and on account of the danger from the depredations of rebels along the road, the officers of the defendant at St. Joseph declined to enter into any contract for the transportation of the command and its effects, the property of plaintiff included, and no contract was made or signed until after the arrival of the train at Hannibal.

On demand of commanding officer means of transportation were furnished, and out of the cars in the company's yard the commanding officer selected the car to carry the baggage, &c., of the command, including the property of the plaintiff, and also nine thousand cartridges.

The car selected was well built and secure.

It was loaded by men detailed from the command and guarded by others, the servants of the company having nothing to do with its selection or freighting.

It was received locked by the company's employees, and placed in the train next the engine tender.

The train of which this car was a part was a regular passenger train. It had attached, as usual, a baggage car in which there was abundant room for the plaintiff's goods. The company had, too, at St. Joseph, a baggage master, whose duty it was to receive, check, and forward baggage of passengers.

The property of the plaintiff, for the destruction of which he brought suit, consisted of wearing apparel

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for himself and his family, table furniture, including silverware to the value of two hundred and four dollars and fifty cents; three buffalo robes, two deer robes, hair mattresses and pillows, writing desks, tables, engravings, statuary, pictures, and numerous household articles, besides jewelry to the amount of seven hundred and eighty-seven dollars and fifty cents; a set of surgical instruments valued at three hundred and fifty dollars, and an unpublished manuscript. The whole weighing two thousand seven hundred pounds.

The amount of baggage allowed a surgeon by army regulations was eight hundred pounds.

This property was never delivered to the company's servants save in the locked car with the rest of the equipment of the command, nor checked by the baggage master, and the disposition of it was known to the plaintiff.

On the route between St. Joseph and Hannibal the car in which the affairs of the troops were placed caught fire from a cause unknown, and without fault of the company's servants, so far as shown, and was with its contents, including property of the plaintiff, destroyed.

No other cars were burned, and most of the contents of this one might have been saved, after the discovery of the fire, but for fear of the explosion of the cartridges packed in the car.

The court below held that the plaintiff was entitled to recover, and upon stipulation of the parties referred the matter to a referee, to estimate the damages, who allowed the amounts given in the preceding summary for the several articles there mentioned, and the further sum of one thousand dollars for the manuscript, with interest on the whole.

The circuit court refused to allow the item for jewelry, for the manuscript, and for interest.

The confirmation of the report of the referee was

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also objected on the following points, on part of the defendant, and the objections overruled.

(1.) No allowance should have been made for the value of baggage over eight hundred pounds.

(2.) No allowance should have been made for value of silverware.

(3.) Nor for value of surgical instruments.

Judgment was entered for the plaintiff for three thousand one hundred and twenty-nine dollars and sixty cents.

Mr. James Carr, for the plaintiff in error.

Mr. J. H. Ashton, for the defendant in error.

BY THE COURT.—FIELD, J.—Two questions are presented by the record for our determination: 1st, whether upon the facts stated in the agreed case the railroad company was liable as a common carrier for the safe conveyance of the baggage and other property of the plaintiff; and, 2d, whether there was any error in the assessment of damages as allowed by the circuit court.

The railroad company was chartered by the legislature of Missouri in 1847, and for many years its railroad between the city of Hannibal, on the Mississippi River, and the city of Saint Joseph, on the Missouri River, has been constructed and in operation. Between those places the company was, in 1861, a common carrier, over its road, of passengers and their baggage, and of goods and merchandise. As such carrier, its duties and liabilities were plain; as a carrier of passengers it was bound, unless there was reasonable ground for refusal, to take all persons who applied for passage, and their baggage, and as a carrier of goods, to take all other property offered for transportation, and was responsible for the safe conveyance of the baggage and other property to the point for which

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they were destined, or the termination of the road, unless prevented by inevitable accident or the public enemy. Its obligations and liabilities in these respects were not dependent upon the contract of the parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract.

If at any time reasonable ground existed for refusing to receive and carry passengers applying for transportation, and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed.

It does not appear from the agreed case that the company refused to transport over its road the troops of the United States, and the plaintiff and his family who accompanied them, when they arrived, in December, 1861, at Saint Joseph, or their baggage, camp equipments, arms, munitions, and other property, but only that it refused to enter into any special contract for the transportation, on account of the danger to the troops from the insurrectionary condition of the country through which the road ran, and the frequent depredations committed by armed bands of rebels upon the railroad, and its track, bridges, depots, and station-houses.

It was usual at the time, and during the entire war, for railroad companies to transport troops of the United States with their baggage, at a less rate per head, and their equipments, arms, and amunitions at a less rate per pound, than the prices paid by ordinary passengers for similar services, and it was undoubtedly the desire of the commanding officer in this case to have a special contract as to the amount of compensation to be paid

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for the transportation. As we read the agreed statement it was only a contract of this kind, fixing the rate of compensation, which was refused.

Whether the reasons assigned would also have justified a refusal to transport the troops and the plaintiff, with his family, and their baggage and other property, it is unnecessary to determine. It is enough to fasten a liability upon the company that it did not insist upon these reasons and withhold the transportation, but, on the contrary, undertook the carriage of men and property without being subjected to any compulsion or coercion in the matter.

The liability of the company was in no respect affected by the fact that the baggage, camp equipments, arms and munitions of the troops, and the property of the plaintiff were placed in a separate car, selected by the commanding officer out of several cars standing in the yard of the company, and not in its regular baggage car, or by the fact that the car was loaded by some of the soldiers detailed for that purpose, and not by the servants of the defendant. The car selected belonged to the company, and, after it was loaded and locked by the commanding officer, the agents and employees of the company took charge of it and placed it in the regular train, which transported the troops and the plaintiff and his family, next to the tender of the engine. The liability of the company attached when it thus took possession of the property. No objection was made at the time to the selection of a separate car for the baggage and other property of the troops and the plaintiff, or to the kind of property offered for transportation, or to the manner in which the property was packed, or to the locking up of the car by the commanding officer. If objection existed on any of these grounds, or on any other ground not concealed but open to the observation of the company, it should have been stated before the property was received.

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The company might then have insisted, as a condition of its undertaking the transportation, upon the selection of a different car, or upon superintending its loading, or upon the possession of its key, or upon all of these things. Not having thus insisted, but having received the property and undertaken its transportation in the car in which it was placed, the company assumed, with respect to it, the ordinary liabilities of a common carrier.

The case of *Mallory v. Tioga Railroad Company*, 39 Barb. 448, is much stronger than this. There the company only agreed with the plaintiff to furnish the motive power to draw his cars laden with his property, he to load and unload the cars and to furnish brakemen, to be under the control of the conductor of the train, to accompany them, yet the company was held liable, as a common carrier, for injuries to the cars and the property of the plaintiff not caused by inevitable accident or the public enemy. The court did not consider the fact that the property was transported in the cars of the plaintiff, and that the cars were loaded and unloaded by him, affected in any respect, the liability of the company, the entire train in which the cars were moved being, whilst on the route, under the control and management of its servants and employees.

In all such cases the liability of the common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded. The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. The consequences of his neglect in these particulars cannot be transferred to the owners of the property.

It does not distinctly appear, from the agreed case, whether any troops were detailed to guard the car

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which contained their property and that of the plaintiff, except while the car was being loaded. But if it were admitted that a special guard was appointed for the car on the route, the admission would not aid the company or relieve it of liability. The control and management of the car, or of the train, by the servants and employees of the company, were not impeded or interfered with ; and where no such interference is attempted it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety.

The rulings of the court upon the findings of the referee, appointed to ascertain the damages sustained by the plaintiff, does not appear to us to be open to any valid objection. A considerable portion of the property it is true, was not personal baggage, which the company was obliged to transport under the contract to carry the person ; nor does it appear that it was offered to the company as such. It embraced buffalo robes, hair mattresses, pillows, writing desks, tables, statuary, and pictures, in relation to which there could be no concealment, and it is not pretended that any was attempted. Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of this character, in relation to which no fraud or concealment is practiced or attempted upon its employees, it must be considered to assume, with reference to it, the liability of common carriers of merchandise. It may refuse to receive on the passenger train other than the baggage of the passenger, for a contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience ; such quantity depending, of course, upon the station of the party, the object and length of the journey, and many other considerations. But if property offered with the passenger is

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not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage.

Here two companies of artillery in the army of the United States sought transportation with their arms, equipments, and ammunition. The plaintiff, as surgeon in the army, was ordered to accompany the troops, and for him and his family and his property transportation was also sought as part of the general transportation for the whole command. On arrival at Hannibal the amount of compensation for the entire transportation, which included carriage of men and property, was agreed upon and was subsequently paid. It is to be presumed when the compensation was fixed that the company took into consideration not merely the peculiar kind of property carried by the troops, which could hardly be treated as simple baggage of travelers, but also the property besides baggage possessed by the plaintiff and his family. The value of the unpublished treatise on veterinary surgery, and of the jewelry, as estimated by the referee, was excluded in the amount allowed. The value of the surgical instruments was properly included. Instruments of that character, in the case of a surgeon in the army traveling with troops, may properly be regarded as part of his baggage. He may be required to use these instruments at any time, and must, accordingly, have them near his person, where they can be had upon a moment's notice. Whether the table silverware of the plaintiff, although of a very limited amount, can be regarded in the same manner, admits of much doubt. It does not appear that the plaintiff or his family had any occasion for this ware on the cars, or even that

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they carried it with any intention of using it on the route. It is not, however, necessary to charge the defendant, that it should be treated as baggage. Its value may be properly included in the amount of damages, considering it only as part of the property which the company received as a common carrier of goods, and against the loss of which, from any cause but inevitable accident or the public, it was, as such carrier, an insurer to the plaintiff.

We see no error in the judgment of the circuit court, and it is accordingly affirmed.

EMPIRE TRANSPORTATION COMPANY v.
WALLACE.

68 *Pennsylvania*, 302.

Common carrier. In the absence of special contract, the obligation of a carrier of goods is to transport them by the usual route proposed by him to the public, and to deliver them within a reasonable time.

This, whether by the route of his own carriage or extended to points beyond.

He must use reasonable expedition, but is not bound to use extraordinary exertions or extra expense to surmount obstacles not caused by his own default, but by the weather, or other act of Providence. The established route of a carrier was by rail to Philadelphia, and by water to Boston. He was not bound to send goods by rail from Philadelphia when there was an obstruction in the water communication.

Error to the court of common pleas of Warren county.

This was an action of assumpsit, commenced July

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24, 1868, by Alexander Wallace against the Empire Transportation Company, for damages on account of the company defendants having failed to deliver a quantity of petroleum according to the contract in three bills of lading, one for one hundred and eighteen barrels, one for fifty-eight barrels and one for sixty barrels. The bills of lading were similar.

The first was :

"Received, Irvineton, December 19, 1865, of Alex. Wallace 118 barrels, said to contain crude oil, and marked A. Wallace, to be transported to Barney, Spencer & West, at Boston, at \$1.35 (freight for this and connecting companies or agents) per 100 pounds, subject to the following conditions and agreement."

Amongst the conditions of the bill of lading were these :

"2. This merchandise may be carried in box cars, covered skeleton cars, or on open platform cars ; if destined beyond Philadelphia, it may be transported by water in vessels, boats, barges or lighters, and if so destined to any point beyond, the same may be intrusted or delivered in the cars of this company, or otherwise to any other railroad or transportation company or agent ; and such railroad or transportation company or agent so selected, shall be regarded exclusively as the agent of the owner or consignee, and shall be entitled to the benefit of the conditions and provisions of this, and of such bill of lading as they may deliver therefor ; and the Empire Transportation Company shall not be, in any event, responsible for the negligence or non-performance of any such company or agent, nor shall such company or agent be liable for any loss or injury except upon its or their respective routes, and while such merchandise is in their respective custody.

"3. That the owner or consignee (in consideration of the extremely hazardous nature of such merchan-

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dise, which is not covered by any extra charge for transportation) hereby assumes all risk from leakage, evaporation and loss by fire, while in transit, or at depots, or in stations, or on board boats, vessels or lighters, from any cause whatever, and all dangers and delays of railroad and water transportation to point of destination, and in any claim or demand, suit at law or equity, against this company or transportation company or agent, for loss or damage thereby, this bill of lading shall be deemed and taken as a release in full therefor."

Barney, one of the consignee, firm, testified : " The crude oil was consigned to our firm of Barney, Spencer & West at Boston aforesaid, to be sold on Mr. Wallace's account. The bills of lading were received about January 1, 1866. We did not receive oil from Mr. Wallace in December. Our firm found it at Philadelphia on or about January 25, 1866, Mr. Spencer of the firm being sent on to look it up, the oil not coming to hand and we being anxious to get it. At that time we were paying one dollar per barrel for freight by steamer from Philadelphia to Boston. We were not receiving any by rail. The time by water was from fifty to sixty hours. I made sales from forty-three to forty-five cents per gallon, which was the market price ; about February 1, when I understand the sale was made in Philadelphia, the price in Boston was from thirty-five to thirty-seven cents per gallon. It was a declining market, and commenced about the middle of January, and continued until after May 1."

Spencer, another of the firm, testified : " Oil shipped to our firm from Irvineton, took from fifteen to eighteen days to reach us, which was the usual and ordinary time between the places. I found the oil on January 23, 1866, at Point Breeze, below Philadelphia. I went for the purpose of finding this oil. It was in defendants' warehouse there. The reason given why the oil

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had not been forwarded, was that when' the oil arrived in Philadelphia the river was closed by ice. It was delivered at the station of the Pennsylvania Railroad Company at West Philadelphia about January 26—in that vicinity. I received it then because the loss by leakage while waiting for the river to open would be so great. There was direct railroad communications then between Philadelphia and Boston. I sold it in Philadelphia and did not ship it to Boston, because the river was closed, and it would have been very expensive to have it sent by rail from there. It was sold February 2. It occupied from two or four weeks by water. We sold oil for plaintiff previously ; it came by the New York Central Railroad. The rate of freight by the defendants' line was one dollar per barrel in excess of the New York Central Railroad Company's rates, between December 1865 and January 9, 1866. The oil was stored by the defendants at Point Breeze, and no notice was given to us, so we might go and take care of it."

William G. Warden, the agent of defendants, testified : " We received, on December 28 and 29, 1865, two hundred and thirty-six barrels of crude petroleum, to be shipped to Barney, Spencer & West, of Boston. Philadelphia being the terminus of the rail route of Empire Line, defendant, the means of transportation from that point were by water to Boston, and the Empire Line was not carrying oil any further than Philadelphia by this route. I tried to get vessels while the oil was in the custody of the company, but could not succeed on account of ice in the harbor."

The following are points of the defendants with their answers :

"4. Under the bill of lading in evidence, defendants had the right to ship the goods by water from Philadelphia, and were not bound, if they found the river frozen over, to incur extra expense to forward them by another route.

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“Answered in the negative as in our general charge.

“4. If the jury believe that defendants were prevented or delayed from carrying the goods, by the river at Philadelphia being frozen, so that it was impossible to forward them by water, that being the ordinary route of defendants, plaintiff cannot recover.

“For answer to this we refer to our general charge.”

The court (VINCENT J.) charged :

“The defendant is a common carrier and therefore liable for the loss of goods in transit by it, not caused by the act of God or the public enemy, unless this common-law liability is restricted or changed by the contract of the parties. The goods mentioned in the bills of lading in evidence were never delivered at Boston, the place of consignment, but where in fact received by the consignees in Philadelphia, and this relieved the defendant of his obligation to deliver them at Boston. In the absence of evidence to the contrary the presumption is that the consignees received the packages of oil in good order and if there was a deficiency from leakage, or evaporation, the defendant is not liable therefor unless caused by gross negligence, of which there is no evidence.

[“By the contract made in regard to these goods the defendants had a right to transport the goods beyond Philadelphia by water, but it did not restrict itself to that mode of transportation. The second clause in the conditions in the contract show plainly in our opinion that another mode of transportation was contemplated by the company, for it provides that if the goods are delivered to another *railroad* company it shall become the agent of the owner or consignee, and the defendant was not to be liable for its neglect. The plaintiff then, in our opinion, had a right to suppose that the oil would be delivered in Boston without unnecessary delay, and that if it could not be delivered by water, it would be sent by rail.] [The evidence shows that the defendant

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never delivered the oil to any other railroad or transportation company, but retained it in its own possession, and it is therefore liable for any loss that has accrued to the plaintiff by any undue or unnecessary delay in the transportation of the oil to Boston.] If the river was not frozen up so as to prevent vessels from leaving for some six to eight days after the arrival of the oil at Philadelphia, was it negligence in the defendants not to send it forward? If it was, the consequent loss to the plaintiff must fall upon the defendant, for in our opinion the defendant was bound to send the oil forward if it could have been sent by water after it arrived at Philadelphia, before the river was closed by ice.

[“The evidence is that oil could ordinarily be taken from Philadelphia to Boston by water in from fifty to sixty hours, and from Irvineton to Boston in from fifteen to eighteen days. This oil reached Philadelphia in eight or nine days from Irvineton, which left the defendant from seven to ten days to get it to Boston within the ordinary time. It was still in Philadelphia on January 26, and, according to all the evidence, no effort had been made to send it forward by rail, nor had any notice been given to the consignees that it was delayed by ice in the Delaware.] We cannot so construe the contract in this case as to instruct you that the defendant was not bound to send the oil to Boston until it could send it by water from Philadelphia. Nor are we able to see why the defendant is not liable for any loss the plaintiff has sustained by its neglect because the plaintiff's consignees received the oil in Philadelphia if, at the time it was so received, a loss had accrued caused by that neglect, and whether a loss had thus accrued from that cause is a question of fact for you. If oil had not fallen in price up to the time this oil ought to have been delivered in Boston, the plaintiff has sustained no damage at the hands of defendant.

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If it did fall in price before it was delivered to the plaintiff's consignees, involving a loss to the plaintiff by the neglect of the defendants, it is liable for the loss so sustained by the plaintiff."

The verdict was for the plaintiff for seven hundred and five dollars and ten cents.

The defendants removed the case to the supreme court and assigned for error the answers to points and the part of the charge in brackets.

J. R. Clark, for plaintiffs in error.—Carriers may limit their liability by their bills of lading. *Farnham v. C. & A. R. R.*, 5 *P. F. Smith*, 59. In the absence of any special contract the obligation of a carrier of goods is to carry them by the usual route professed by him to the public, and to deliver them within a reasonable time. *Redfield on Carriers*, §§ 210, 220, 221. If it be his usual course of business to forward goods beyond his route by sailing vessels, he is not liable for not forwarding a particular article by steam-vessels, unless the direction to do so be clear and unambiguous. *Id.* § 182. And he is not bound to use any extraordinary efforts, or incur extra expense in order to surmount obstacles caused by the act of God, as a fall of snow. *Id.* § 305.

Testimony may be introduced to show the real contract under a bill of lading. *Baltimore & P. Steamboat Co. v. Brown*, 4 *P. F. Smith* 77; *Ang. on Car.* § 179.

R. Brown, for defendant in error.—Contracts limiting a carrier's liability are strictly construed. In *The Reeside*, 2 *Sumn.* 267; *Ang. on Car.* § 226, a; *Chouteaux v. Leech*, 6 *Harr.* 224. His liability is not measured merely by the terms of the contract, but also by the law applicable to common carriers. *Ang. on Car.* § 226, note a. Parol evidence to vary its terms is

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admissible. *Id.* § 228, note a; B. & P. Steamboat Co. v. Brown, 4 *P. F. Smith*, 77; Peters v. Rylands, 8 *Harr.* 497; Warden v. Greer, 6 *Watts*, 424.

BY THE COURT.—SHARSWOOD, J.—It is well settled elementary law, that in the absence of any special contract the obligation of a carrier of goods is to transport them by the usual route proposed by him to the public, and to deliver them within a reasonable time. This rule applies as well where he confines his undertaking to the route of his own carriage as where he extends it to forward goods to points beyond. He must use reasonable expedition, but is not bound to extraordinary exertions or to incur extra expense in order to surmount obstacles not caused by his own default, but by the weather or other act of Providence. *Redf. on Car.* §§ 210, 220, 302, 304, 305.

The contract between the parties in this suit was contained in the bill of lading as it is termed, or receipt for transportation. It did not by any special stipulations vary the extent of the legal obligations resting upon the carriers receiving goods to be transported to Boston, a point beyond their own line. It fully appeared that the established route of the defendants below was by railroad to Philadelphia, and from thence by water to Boston. It is true the transportation company were not absolutely bound to this route beyond Philadelphia. They had the option to send the goods forward, either by water in vessels, boats, barges, or lighters, or by any railroad or transportation company or agent. There was certainly nothing in this option to render it incumbent upon the carriers to send the goods by railroad whenever there was any obstruction of the communication by water. There is nothing in it which gave the plaintiff any right to suppose that the goods would be delivered in Boston without any unnecessary delay, and that if they

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could not be immediately sent on by water, they would be sent by rail. Obstructions by ice in the river are in their nature merely temporary, and of very uncertain duration. They rarely last longer than one or two weeks, and the ice may break up and disappear so as to reopen navigation in twenty-four hours. It had been expressly stipulated that the owner or consignee should assume all risks from dangers and delays of railroad and water transportation to point of destination. The defendants below were not bound to incur the extraordinary expenses of sending the oil on by railroad, because it happened that the Delaware river was so obstructed by ice at or immediately after the article arrived in Philadelphia as to prevent their obtaining vessels for the purpose. That this expense would have been extraordinary appeared by the testimony of Henry F. Spencer, a witness whose deposition was taken on behalf of the plaintiff below and read by him on the trial, who, by the plaintiff's authority, received the oil at Philadelphia from the hands of the defendants below. He said: "I sold it in Philadelphia, and did not ship it to Boston, because the river was closed, and it would have been very expensive to have sent it by rail from there." It was very properly submitted by the learned judge below to the jury, to say, as a question of fact, whether there was negligence causing unnecessary delay, in the company not sending the oil as soon as possible after its arrival in Philadelphia, if the river was not frozen up so as to prevent vessels from leaving for some six to eight days after that. Had the learned judge rested there, it would have been perfectly right, for there certainly was evidence sufficient to justify that submission. But after thus submitting this question, the learned judge went much further, and in effect took the case back from the jury, when in his answers to the points, and in his charge, he instructed them that if the defendants could not for

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any providential reason beyond their control send on the merchandise by water they were bound to send it by railroad, and that not having done so, they were responsible to the plaintiff for the loss he had sustained by the fall in the market during the delay. In this we think there was error.

Judgment reversed, and *venire facias de novo* awarded.

WARD v. NEW YORK CENTRAL RAILROAD COMPANY.

47 New York, 29.

Railroad. Common carrier. The law implies an agreement on the part of a railroad company, when no express contract is made, to transport merchandise entrusted to it as a common carrier, within a reasonable time.

Measure of damages. If the company negligently omits to do so, and the market value of the merchandise falls, the difference in its value at the time and place when and where it should have been delivered, and at the time of its actual delivery, will be the measure of the damages which may be recovered.

Appeal from judgment of the general term of the supreme court, eighth judicial district.

Plaintiffs, partners in business, on December 9, shipped by defendant's company from Le Roy, in Genesee county, to consignees in New York city, seventy-eight dressed hogs, weighing nine thousand one hundred and eighty-two pounds, belonging to plaintiffs.

In the regular course of transportation, this property should have reached New York in forty-eight hours. It was, however, unnecessarily detained by the defendant, and did not arrive until December 26, 1867.

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In the mean time there had been a fall in the market price of the produce of one and a half per cent. per pound.

Suit was brought by plaintiffs to recover damages incurred by reason of the neglect to transport the property within a reasonable time. Trial had before a referee, who held that the plaintiffs were not entitled to recover for the decline in market value, and ordered a judgment in favor of the defendant.

The judgment was affirmed in the supreme court of said district, and appeal taken as stated.

W. F. Cogswell, for appellants.—Plaintiff was entitled to recover his loss by the depreciation in the market value of the property after the time it should have been delivered. *Kent v. Hudson River R. R. Co.*, 22 *Barb.* 278; in *Medberry v. New York & Erie R. R. Co.*, 26 *Id.* 564; *Brackett v. McNair*, 14 *Johns.* 110; and *Leonard v. Telegraph Co.*, 41 *N. Y.* 544; *Griffin v. Colver*, 16 *Id.* 489; and *Scovill v. Griffith*, 12 *N. Y.* 509; *Collard v. South-eastern Railway Co.*, 7 *Hurls. & N.* 79; *Wilson v. Lancashire and Yorkshire Railway Co.*, 99 *Eng. Com. L.* 632; *Same v. New Castle & Berwick Railway Co.*, 18 *Eng. L. & Eq.* 557, 559; *O'Hanlon v. Northern R. R. Co.*, 6 *Best & S.* 484; *Ingledeu v. Northern R. R. Co.*, 7 *Gray*, 86; *Smith v. New Haven & Northampton Railway Co.*, 12 *Allen*, 531; *Cutting v. Grand Trunk R. R. Co.*, 13 *Id.* 381; *Weston v. Grand Trunk R. R. Co.*, 54 *Me.* 376; *Hackett v. Boston, Concord & Montreal R. R. Co.*, 35 *N. H.* 390; *King v. Woodbridge*, 34 *Vt.* 565; *O'Conner v. Foster*, 10 *Watts*, 418; *Sisson v. Cleveland and Toledo R. R. Co.*, 14 *Mich.* 489; *Peet v. Chicago R. R. Co.*, 20 *Wis.* 594; *Whalen v. Aldrich*, 8 *Minn.* 346; *Davies v. Shields*, 24 *Wend.* 322; *Clark v. Pinney*, 7 *Cow.* 681; *Priestly v. Northern Ind. and Chicago R. R. Co.*, 26 *Ill.* 205; *Sedgw. on Dam.* 4 ed. 401; 1 ed.

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355. The rule of damages is the same whether the goods were shipped to be sold in the market or not. *Cutting v. Grand Trunk Railway Co.*, 13 *Allen*, 581, and cases there cited. The defendant is liable, although the delay occurred upon its connecting road. *Laws of 1847*, ch. 270, § 9, p. 299; *Foy v. Troy & Boston R. Co.*, 24 *Barb.* 382; *Muschamp v. Lancaster & Breton Junction Railroad*, 8 *Mees. & W.* 421; *Nashua Lock Co. v. Worcester & Nashua R. R. Co.*, 48 *N. H.* 339, and cases therein cited.

M. W. Cooke, for respondent.—The burden of proof as to error is with the appellants. *Chubbuck v. Vernam*, 42 *N. Y.* 432. The contract was for transportation to Albany only. *Root v. Gt. W. R. R. Co.*, Ct. App. not yet reported, *RAPALLO*, J.; *Pendergast v. Adams Ex. Co.*, 101 *Mass.* 120. The diminution in the market price of the goods was not the true measure of damages. *Wibert v. N. Y. & E. R. R. Co.*, 19 *Barb.* 36; *Jones v. N. Y. & E. R. R. Co.*, 29 *Id.* 633; *Conger v. H. R. R. Co.*, 6 *Duer*, 375, 381, 382, and cases cited below in argument; *Griffin v. Colver*, 16 *N. Y.* 489; *Sedgw. on Dam.* 4 ed. ch. 3, p. 81, note 1; p. 406, note 3; *Hamilton v. McPherson*, 28 *N. Y.* 72, 77; *Hadley v. Baxendale*, 9 *Exch.* 341; *Hales v. London & North-western R. Co.*, 4 *B. & S.* 66, op. of Lord COCKBURN, C. J.; *Briggs v. N. Y. C. R. R. Co.*, 28 *Barb.* 515, 521, op. of E. DARWIN SMITH, J.; *Smeed v. Ford*, 1 *Ellis & Ellis*, 602, and 28 *L. J. N. S.* 178; *Gee v. Lancashire & Yorkshire R. Co.*, 6 *H. & N.* 211; *Great Western R. Co. v. Rodmayne*, 1 *Law Rep. C. P.* 329; *Kent v. H. R. R. Co.*, 22 *Barb.* 278; *Medbury v. N. Y. and E. R. Co.*, 26 *Id.* 564; *Leonard v. N. Y. and Tel. Co.*, 41 *N. Y.* 544; *Collard v. S. E. R. Co.*, 99 *Eng. C. L.* 632; *Smith v. N. H. & W. R. Co.*, 12 *Allen*, 531; *King v. Woodbridge*, 34 *Vt.* 565; *Wibert v. N. Y. and E. R. R. Co.*, 19 *Barb.* 36. *Jones v.*

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Same, 29, *Id.* 633; Conger v. H. R. R. R. Co., 6 *Duer*, 875, 301, 381.

PECKHAM, J.—It is insisted by the defendant, that it is not liable for any damages happening to this property after it reached Albany and was placed in the custody of the Hudson River road for further transportation, because the contract for transportation showed that its liability as common carrier ceased at Albany. The answer to this is, that the referee finds expressly, that “the defendant received this property of plaintiffs for transportation to the city of New York,” and the whole evidence is not contained in the case. Only a small part is retained, and then the case adds that “evidence was introduced by the parties, from which the referee found the facts which appear in his report.” Under such circumstances it cannot be said that the referee has found this fact without any evidence to support it. We are bound to presume that there was sufficient evidence.

The facts as found present the distinct question, what is the measure of damages against a carrier who has negligently omitted to deliver the goods at the time he ought to have delivered them?

When a contract has been violated the law intends to give to the party injured the damages caused thereby; that is, the natural and proximate damages caused by the breach. It is supposed that both parties contemplated the consequences of such breach at the time they made the contract, and acted accordingly both in making and in performing or violating its provisions. *Griffin v. Colver*, 16 *N. Y.* 489, and cases there cited.

When a carrier from mere negligence, from plain violation of duty, omits to transport merchandise beyond a reasonable time and its market value falls in the mean time, the true rule of damages in my judgment both upon principle and authority, is the differ-

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ence in its value at the time and place it ought to have been delivered and the time of its actual delivery. The rule is simple, and though it may sometimes operate harshly, easily applied.

Sagacious business men rely upon their ability to judge of the market in undertaking large commercial projects. According to their views of the market, they send their merchandise by a quick or by a slow carrier, and make compensation accordingly.

A contrary rule would deprive them of all benefit of a rapid transit. It would be left to the caprice of the carrier when to transport, and the owner could have no relief. It would be no answer to say that the owner might make a special contract for the transport at a given time. The contract would have to contain a special provision to pay these damages, or the carrier's liability would not be altered. If a special contract be needed, I think it falls upon the defendant to make it, or the company will be liable for not delivering in a reasonable time.

If the carrier would be liable for these damages upon a special contract to transport by a given time, he clearly would be for a violation of his duty. In the absence of any special agreement, the law implies that the carrier agrees to transport in a reasonable time. That is his duty. In failing to do so, he not only violates his duty, but also the contract upon which it is based. The only legal difference is that by the special contract, the carrier agrees and is required absolutely to transport by a given time. In such case, no excuses will save him from damages for a breach such as will entirely shield him in the absence of a special agreement. *Redf. on Rail.* 161-3, 273; *Harmony v. Bingham*, 12 N. Y., 99.

It is well settled law that a carrier, on an entire failure to deliver, is liable for the market price of the goods at the time and place for delivery. *O'Hanlon v.*

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North. R. R. Co., 6 *Best & Smith*, 484 ; *Bracket v. McNair*, 14 *Johns*. 170. So held at the present term of this court. *Sands v. Lilienthal*, 46 *N. Y.* 541. So as to a sale of goods. For all damages to the property while in the custody of the carrier, the measure thereof is to be settled by the market at the place for delivery. This is clearly so as to all inland carriage. See the last case. *Bracket v. McNair*, 14 *Johns*. 170 ; 34 *Barb.* 502.

If liable to the market price at the time and place for delivery, where not delivered at all, it would seem equally rational that if, by reason of the inexcusably negligent delay of the carrier, the value of the goods has depreciated in market, he should be liable to the owner to the extent of that depreciation. The purpose of the law is to make the owner whole in each case.

There is an elaborate opinion in favor of the defendant in *Wibert v. N. Y. & E. R. R. Co.*, 19 *Barb.* 36, but the point was not necessarily decided. The referee obviously erred in finding the road guilty of negligence in not forwarding the goods. The same opinion was reiterated by the same court in 29 *Id.* 633. With this exception I am not aware of any decision in that direction here or elsewhere. The chief objections urged against this rule are that the damages are not proximate, but remote, if any damages at all ; that in fact the delay is not the cause of the damage ; it did not cause the fall ; that the goods being delivered in good order, the loss caused by the fall in the market cannot be charged to the carrier as damages ; that markets are fluctuating and uncertain.

Had the goods been injured by reason of improper exposure by the carrier, and thus had become depreciated in their market value, it is clear that the carrier would be liable for the loss. It was his negligence that caused it. Here his negligent delay caused the loss. It did not cause the decline in the general market, but

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it deprived the owner of his right to the higher market price. The defendant's negligent violation of its duty thus deprived the plaintiff of his right, and placed this loss upon him. In substance, this loss is the same to the plaintiff as if the injury had been done to the property itself and thus diminished its market value. The injury also is natural and direct. There is no second step; no action of the owner with a third person by contract or otherwise. It is true there are fluctuations in the market. They prevail to some extent as to all commodities which are the subject of transportation.

That is not a sufficient reason for abolishing their use in ascertaining the rights and liabilities of parties. Confessedly they regulate the rights of parties where there is an entire failure to deliver either by a carrier or by a vendor. Legally they are the true measure of the value of the goods. Arriving so late, later by the carrier's negligence, these goods were not worth as much as at the time they should have arrived; not so much when measured by the rule that governs the commercial community. Their actual value was less when measured by the only standard that regulates values.

Why should not the defendant pay this loss its negligence has caused? The rule as here claimed is decided to be the true one, in *Kent v. Hud. R. R. Co.*, 22 *Barb.* 278; in *Medbury v. N. Y. & E. Road*, 26 *Id.* 564. It is fully recognized in *Griffin v. Colver*, 16 *N. Y.* 489. It is so decided in England, in *Collard v. S. E. Railway Co.*, 7 *Hurl. & N.* 70; in *Wilson v. Lancashire & York Rail. Co.*, 99 *Eng. C. L.* 632; *Same v. New Castle & Ber. R. Co.*, 18 *E. L. & E.* 557. In one of these cases (*Wilson v. New Castle & Ber. R. Co.*) the contract required the merchandise to be transported by a certain time, but was silent as to paying any damages. It is also so held in many of our sister

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States. Cutting v. Grand Trunk R. R. Co., 13 Allen, 381; Sisson v. Cl. & Tol. R. R. Co., 14 Mich. 489.

But if this be not the true rule as to the measure of damages, what is?

Wilbert v. Erie Road gives no aid upon this point. That holds substantially that the road is not responsible for such loss. It is *damnum absque injuria*. It in effect holds that the road's neglect, whereby the goods are delayed and subjected to a fallen market, and the owner to that loss, is no legal injury. We all think otherwise, and that this is the only rule that does justice between the parties.

It is urged, however, that there was no evidence that this property was sent to New York to be sold in market; none that it was actually sold at a loss.

From the findings of the referee, I think it clear that the plaintiff had sustained these damages, "resulting solely from a fall in the market price;" but he held that such damages were not recoverable.

If the plaintiff sold the goods in a brief time after their arrival, without sustaining any loss, that would be matter of defense; thus showing that the fall was a mere momentary fluctuation in the market, and that the delay really did not injure the plaintiff.

The rule is undoubtedly somewhat stringent; hence the proof of negligence in this respect should be quite clear.

There are many circumstances that would excuse a carrier from transporting in the time usually required for an ordinary passage; an unusual crowd of freight, storms or freshets, &c. 2 Redf. on Rail. 261, § 173, and cases in note.

Judgment should be reversed and new trial ordered, costs to abide the event.

All concurred.

Judgment reversed.

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WINNE v. ILLINOIS CENTRAL RAILROAD COMPANY.

81 Iowa, 588.

Evidence—Railroad—Carrier. In an action to recover damages of a railroad company for injury to a lot of flour during its transportation, the evidence of a witness, who only saw a part of the flour examined at the place of destination, is admissible on behalf of plaintiff. The objection that the witness only saw a *part* of the flour examined, does not go to his competency.

Common carrier—Exceptions of liability—Onus. In all cases of loss or injury to property intrusted to a common carrier for transportation, the burden of proof is on him to show that the loss was occasioned by the act of God or the public enemies. Proof of the delivery of the goods and their loss or injury while in the carrier's hands, makes out a *prima facie* case for the plaintiff.

Measure of damages—Railroad. The application of the general rule that, in this class of actions, the measure of damages is the difference between the market value of the goods as delivered and what their value would have been if they had not been damaged in the course of transportation, is not always just and proper.

It was accordingly *Held*, in an action against a railroad company for damages to a lot of flour, that the plaintiff might show and recover what it cost to put the flour in a salable condition after its arrival at the place of consignment, it appearing that such expenditure was beneficial to the defendant by reducing the damages which it otherwise would have sustained under the operation of the general rule above referred to.

Presumption as to compensation. Where goods are delivered to a common carrier to be transported, a promise to pay freights will be implied, and it is not necessary to prove payment or tender of the charges in order to hold him liable in his capacity of common carrier. The law will not presume that the bailment was gratuitous.

Appeal from Floyd circuit court.

This action was brought by the plaintiff to recover damages to four hundred barrels of flour, alleged to

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have been sustained while the same was being transported from Waverly, Iowa, to Chicago, Illinois, on defendant's railroad. The cause was tried by a jury; verdict and judgment for plaintiff, and defendant appeals.

Crane & Rood, and *Starr & Patterson*, for the appellant.

Pratt & Root, for the appellee.

MILLER, J.—I. Before the commencement of the trial below, the defendant filed a motion to strike out certain portions of depositions taken by the plaintiff. This motion was overruled, and the defendant assigns such ruling as error. The objections to the testimony of the witnesses, as stated in the motion, are immateriality and irrelevancy, and it is urged in argument that as their testimony shows that they could not state the condition of all the flour when it was examined in Chicago; that as they saw only a part of it examined, their evidence should have been excluded.

The statements of the witnesses that they saw a portion of the flour in controversy examined in Chicago, and after it had been delivered by the defendant to the consignee, and that it was damaged by having got wet, was certainly relevant testimony, tending to show that the flour had not been delivered in good order, which was an essential part of the plaintiff's case; and that these witnesses did not see *all* of the four hundred barrels examined, and could not therefore testify as to the condition of them all, did not affect the competency of their evidence in respect to the condition of the flour which they did see examined.

That these witnesses did not see all the flour examined afforded proper ground for argument to the jury upon the extent of plaintiff's right of recovery,

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but was no objection to the revelancy or competency of the evidence.

The other considerations urged by counsel for appellant in respect to the incompetency of portions of the testimony contained in plaintiff's depositions will be considered hereafter in connection with instructions relating to the proper measure of damages.

II. The second error urged in argument is, that there was error in the third and fifth paragraphs of the charge of the court, which were as follows :

3rd. "If you find that the plaintiff delivered flour to defendant, to be transported by defendant to Chicago, Ill., as claimed by plaintiff, it was the duty of the defendant to transport the flour to its destination, and deliver it to plaintiff's consignee or agent in as good a condition as it was when delivered to defendant for transportation, and the defendant will be liable for any damage resulting to the flour while in the custody or control of defendant."

5th. "If from the evidence you believe that plaintiff delivered the flour to defendant as claimed by plaintiff, and that such flour was damaged while in the custody and control of defendant, you will find a verdict for plaintiff."

The appellants insist that these instructions were erroneous, for the reason that "neither of them contain the exceptions to defendant's responsibility as a carrier—the acts of God and the public enemy." Whatever force there would be in this objection is destroyed by the fact that these exceptions *are* embraced in the third and fourth instructions given at the request of the plaintiff. It is further objected by appellant, however, that the exceptions contained in these last instructions cast the burden of proving the exceptions upon the defendant.

Ordinarily the plaintiff makes out a *prima facie* case by showing that he delivered his goods to the car-

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rier in good order, and that when the carrier delivered them to the consignee, they were in bad order, or in a damaged condition. The carrier may then show that the injury to the goods was caused by the act of God or the public enemy, and thus be exonerated from liability. It has been the settled law of England for ages, and of America since its first settlement, that a common carrier is responsible for all losses except those occasioned by the act of God or the public enemy, and that the loss of, or damage done to, property in his possession to be carried, is of itself sufficient *prima facie* proof of negligence. *Angell on Com. Carr.* §§ 67, 148, 149; 2 *Kent Com.* 597. And in all cases of loss or injury to property intrusted to a common carrier for transportation, the *burden of proof is upon him*, to show that the loss was occasioned by the act of God or by public enemies. 2 *Greenl. Ev.* § 219, and cases cited in note 8; *Angle v. M. & M. R. R. Co.*, 18 *Iowa*, 555, and cases there cited. See, also, *Porter v. Chicago & N. W. R. R. Co.*, 20 *Iowa*, 73.

If, however, the *plaintiff's* evidence should show the circumstances which excused the defendant from liability, the plaintiff would not be entitled to a verdict, although the defendant offered no evidence. Such, however, was not the fact in this case; and there was, therefore, no error in the instructions under consideration.

III. The court below, in the ninth paragraph of the charge, directed the jury that, "if the plaintiff's consignee or agent received the flour in a damaged and unsalable condition, and necessarily had to go to expense to put the flour in a salable condition, plaintiff will be entitled to recover any reasonable expense thus incurred." The giving of this instruction is assigned as error, and appellant's counsel urge that the true rule or measure of damages is the difference between the fair market value of the flour *as delivered* to the

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consignee, and what would have been its fair market value if it had not been injured while in the carrier's possession, at the date of delivery.

The rule contended for is undoubtedly the general rule. Its application, however, is not always just and proper. It might have operated in this case very severely and unjustly on the defendant, for there is evidence tending to show that when the flour came from the hands of the carrier to the consignee it was unsalable; that it had no market value because it could not be sold at all in the market, whereas, by a trifling expense, the flour was rendered salable. Nor is the instruction in conflict with the rule contended for by appellant; for by means of the expense incurred in cleaning the flour and rendering it marketable the amount of such expense was added to the value of the flour in its damaged condition. If the flour in the condition it was delivered by the defendant to the consignee was unsalable, and it could be made salable by incurring a reasonable and necessary expense for that purpose, such expense was for the benefit of the defendant.

Had the court given the broad general rule contended for by the counsel for defendant without qualification, and the jury been convinced that the flour when and as it was delivered by the defendant was unsaleable in the market, was of no value therein, they would have been warranted in assessing the damages at the full market value thereof in good condition, resulting in a verdict against the defendant of thousands instead of hundreds of dollars. By the trifling expense of twenty-five cents per barrel, the flour, before unsalable, was rendered fit for market; and the evidence tends to show that this expense was necessarily the result of the injury to the flour, which the plaintiff had to incur in order that the flour be at all marketable. That such expenses under such circumstances may be

given by the jury as damages we have no doubt. See *Ang. on Com. Carr.* § 490, note a; *Pierce Railr Law*, 465.

IV. The appellant requested the court to instruct the jury that, "unless plaintiff has proved to you that the defendant was a common carrier, and received, or was to receive, pay or pecuniary consideration for such carrying, he must prove that the flour was damaged while in defendant's custody, and through gross neglect of defendant; or he must prove that the defendant did not use as great care and diligence in taking care of the same as a man of ordinary prudence takes of his own property of the same character under like circumstances." The refusal to give this instruction is assigned as error, and it is argued by appellant's counsel that, "unless the defendant was paid or offered compensation, it (defendant) was a gratuitous bailee and not an insurer, and hence not required to exercise more than ordinary care." The evidence sufficiently shows that the defendant is a common carrier, that the flour was delivered to it and transported in the usual course of business; and without any agreement for the price of conveyance, the carrier became entitled to the same, and if not paid might recover on the *quantum meruit*. *Ang. on Com. Carr.* § 392. When goods are delivered to a common carrier to be transported, a promise to pay freights will be implied, and it is not necessary to prove payment or tender of the charges in order to hold the carrier liable in his capacity as a common carrier. The law will not presume, without proof, that the bailment was gratuitous, and if the carrier claims exemption from liability on that ground, the burden of proof is upon him. When the defendant is shown to be a common carrier, the law itself supplies the proof of the contract so far as regards the extent or degree of his liability (2 *Greenl. on Ev.* § 210), and if he would exonerate

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himself or modify his liability, the burden is upon him. *Id.* §§ 216, 219. The entire weight of the responsibility, rigorously imposed by law upon a common carrier, falls upon him contemporaneously with a complete delivery of the goods to him to be forwarded, if accepted, *with or without* a special agreement as to reward. *Ang. on Com. Carr.* § 129. As before remarked, the evidence shows that the plaintiff delivered the flour to the defendant; that it was accepted and forwarded in defendant's cars to the consignee, and the evidence is silent as to whether there was an express contract to pay freight or not, or whether the freight was paid or not. Under such circumstances it must be presumed that the property of the plaintiff was carried for the usual and customary rates, which the plaintiff has either paid or is liable to pay to the defendant. *Edw. on Bail.* 427.

V. Appellant assigns error on the overruling of his motion for a new trial on the ground that the verdict was not sustained by the evidence. We are of opinion that the verdict is sustained by sufficient evidence, and that the defendant's motion for a new trial was properly overruled.

The judgment of the circuit must be affirmed.

KEENEY v. GRAND TRUNK RAILWAY OF
CANADA.

47 *New York*, 525.

Carriers. The defendant, a railway company, undertook to transport for the plaintiffs a quantity of cattle from G. to B., under a contract containing, among others, the following stipulations: "1. That the owners of the cattle undertake all risks of loss, injury, damage and other contingencies in loading, unloading, conveyance

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and otherwise. 2. The company do not undertake to forward the animals by any particular train, or at any special hour; neither are they responsible for the delivery of the animals within any certain time, or for any particular market." The cattle were transported part of the distance agreed, and the cars containing them detached from the train and left on a side track, where they remained some two, and others three days. The usual time for transporting cattle between G. and B. was from eighteen to twenty hours. While the cattle remained on the side track, the weather was very cold. From exposure to the weather, and from the want of food and water, which could not be supplied to them while there, some of the cattle died, and the others were seriously injured. *Held*, that the company was liable for a breach of the contract; its action constituting not merely negligence in the performance of the contract, but an entire and intentional abandonment of all effort to perform it for the time.

Appeal from a judgment of the general term of the supreme court in the fourth judicial department, affirming a judgment upon a verdict in favor of plaintiffs. Reported below, 59 *Barb.* 104.

Action to recover damages for breach of a contract by defendant as common carrier.

E. C. Sprague, for appellant.—The defendant cannot be made responsible in this action for any breach of duty as a common carrier, but only for a breach of the special contracts. *Hamilton v. Grand Trunk Railway Co.*, in the Court of Queen's Bench, Canada; *Paddington v. South Wales R. W. Co.*, 1 *H. & N.* 392; *Stewart v. London & Northwestern R. W. Co.*, 10 *L. T. R. U. S.* 302; and see note 1 *Am. R. Cas.* 181, citing *Shaw v. York, &c. R. Co.*, 6 *Eng. R. Cas.* 87; *Austin v. Manchester, &c. R. Co.*, 5 *Eng. L. & Eq.* 329; *Same v. Same*, 11 *Id.* 506; *Carr v. Lancashire, &c. R. Co.*, 14 *Id.* 340; *Chippendale v. Lancashire, &c. R. Co.*, 7 *Id.* 395; *Merville v. Great U. Co.*, 10 *Id.* 366; *Simmons v. Law*, 3 *Keyes*, 217, and cases cited; *Allen v. Sackrider*, 37 *N. Y.* 341, and cases cited; see, particularly, 1 *Am. R. Cas.* 182, note; see, also,

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Illinois Central Railway v. Morrison, 19 Ill. 136. By the contract, defendant is absolved from liabilities for delays occasioned by the neglect, misconduct or misjudgment of its employees. French v. Buffalo, N. Y. & Erie R. Co., decided in the court of appeals in September, 1868, and reported 4 *Keyes*, 108, and cases cited; Heineman v. G. T. R. Co., 31 *How. Pr.* 430. The rights of the parties are to be determined by the laws of Canada, the contract being made there. Jewell v. Wright, 30 *N. Y.* 259; Pope v. Necker, 3 *Story C. Ct.* 475, *et seq.*; *Story Conf. of L.* §§ 307, 314; Pope v. Nickerson, 3 *Story C. Ct. R.* 465; 2 *Kent Com.* 454, 458, 460, 460; Cox v. U. S., 6 *Pet.* 172; Hale v. N. J. Steam Nav. Co., 15 *Conn.* 539.

S. W. Thayer, for respondents.—Defendant is equally liable for loss or damage as in the transportation of other freight, except as against injuries arising from the nature and propensity of the animals. Clark v. R. & S. R. R. Co., 14 *N. Y.* 570. Contracts of this character should receive a reasonable construction, and such as the parties will be presumed to have intended. Moore v. Evans, 14 *Bar.* 524; Scheffelin v. Harvey, 6 *Johns.* 169; Alexander v. Green, 7 *Hill*, 533; Wells v. Steamboat Nav. Co., 4 *Seld.* 375; French v. B., N. Y. & Erie R. R. Co., 4 *Keyes*, 108; Guillaume v. Ham-burgh & Am. Packet Co., 42 *N. Y.* 214; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 *How. U. S.* 344. The special contract is wholly without consideration, and, therefore, invalid. Bissell v. N. Y. C. R. R. Co., 25 *N. Y.* 450. Defendant is bound, by its express agreement, to use due diligence to convey the property, and to deliver it at Buffalo in a reasonable time. Ward v. Panama R. R. Co., 17 *N. Y.* 362; Marshall v. N. Y. C. R. R. Co., 5 *Albany Law Jour.* No. 5, p. 74; Reed v. Spalding, 4 *Bosw.* 395; affirmed in 30 *N. Y.* 630; Munn v. Commission Co., 15 *Johns.* 44;

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Jeffrey v. Bigelow, 13 *Wend.* 518 ; Anderson v. Conley, 21 *Id.* 279. The law of the place where the contract is to be performed will govern in the construction of the contract. Jewell v. Wright, 27 *How.* 482, and cases cited.

GROVER, J.—In March, 1866, the defendant was a corporation under the laws of Canada, and engaged in the transportation of persons and property by rail, between Goderich and Buffalo. On the fifteenth of that month, the defendant received from the plaintiffs, at Goderich, a quantity of cattle, which it agreed with them to transport and deliver to them at Buffalo, in consideration of the payment of the usual freight, under the following stipulations, regulating its liability :

1. That the owners of the cattle undertake all risks of loss, injury, damage and other contingencies in loading, unloading, conveyance and otherwise.
2. The company do not undertake to forward the animals by any particular train, or at any specified hour ; neither are they responsible for the delivery of the animals within any certain time, or for any particular market.
3. When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default, misconduct, or otherwise, on the part of the company or their servants, or of any other person whomsoever causing or tending to cause the death, injury or detention of persons with such free passes ; and that whether such passes are used in traveling by any regular passenger train, or by any other train.

A portion of the cattle were loaded upon the defendant's car at Goderich on the same day and transported to Brantford, where the car containing them was detached from the train and placed upon a side track, where it remained for three days, and the residue loaded and taken to Brantford upon the sixteenth of

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the same month ; and the car containing them also detached and placed upon the same track, where it remained for two days. The case further shows that the weather was very cold during this interval. That the cattle could not be unloaded from the cars where they were, nor fed or watered while therein. That from exposure to the weather while there, and the want of food and water, some of the cattle died, and the others were seriously injured. It further appeared that the usual time of transporting cattle from Goderich to Buffalo was from eighteen to twenty hours. By the contract the defendant undertook to transport the cattle in the usual way and in the usual time, and deliver them safely at Buffalo ; and in default of performance became liable to the plaintiffs for the damages thereby sustained, unless exempt therefrom by the stipulations of the contract, or some other legal excuse for its failure to perform its contract. The first stipulation restricting the common-law liability of the defendant has no application to the case, as the injury to the cattle did not occur while loading, unloading, or carrying them under the contract. The concluding words of this stipulation, "and otherwise," if they have any meaning, clearly have no application to the present case, as it cannot be claimed that either party thereby understood that it was intended to shield the defendant from liability for running the cattle on to a side track, and unnecessarily abandoning them there to perish by cold and famine. The second clause merely exempts the defendant from liability for failing to forward the cattle by any particular train or at any specified hour, or for a failure to deliver within any certain time or for any particular market. This obviously was designed only to shield the company from liability for its failure to load and place the animals upon any particular train, or if so loaded and placed, for failing to start such train at the particular time ad-

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vertised or at any particular hour, and for failing to deliver within any certain time or in season for any particular market, but not to protect it from liability for an entire failure to perform its contract, or for any substantial breach after entering upon its performance. The third stipulation relates entirely to the liability of the company for injuries to the persons in charge of the cattle riding upon free passes, and has nothing to do with the present case. Leaving the cattle upon the side track at Brantford for the length of time they were left, and under the circumstances of exposure to injury, can in no sense be regarded as an act of negligence in the execution of the contract. It was for the time an entire abandonment of all effort to perform, intentional on the part of the employees of the company; and if such effort had not thereafter been resumed and all the cattle had perished while in the cars upon the side track, no one would, I think, have pretended that the company was excused from liability for their loss, for the reason that the company was, under the contract, exempt from liability for injuries caused by the negligence of its servants in its execution. It is immaterial, therefore, to inquire whether, by the true construction of the contract, the company was so exempt or not; or, if not so exempt by the common law (see *Steinweg v. Erie Railway*, 43 *N. Y.* 123), such an exemption under the law of Canada was shown by the testimony of the learned barrister, introduced by the defendant upon the trial. The judge did not err in denying the request of the defendant's counsel to direct the jury to find a verdict for the defendant. By the law of New York and of Canada, the defendant was liable for the injury in question, unless excused therefrom by such an unusual and unexpected accumulation of freight between Brantford and Buffalo, which the defendant was required by law to transport prior to the receipt of the

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cattle in question, as rendered delay in transporting the latter absolutely necessary. The evidence was far from proving this. Taking the most favorable view of the testimony bearing upon this fact, the most that the defendant could claim was that the question should be submitted to the jury. An examination of the charge shows that it was submitted to the jury, more favorable to the defendant than the law authorized. The court charged the jury, in substance, that the contract required the defendant to transport the cattle according to the usual course of business, and that there should be no affirmative discrimination against this species of freight. That it was the duty of the defendant to forward freight in the order in which it was received. That the defendant had no right to give preference to freight about to become dutiable over that in question, and if it did so, was liable. So far the charge was correct. The court then erroneously charged the jury that, if such preference was given, and the consequent delay had resulted from the misconduct or negligence of what were ordinarily known as the employees of the defendant, it would not be liable; but that the defendant was liable for its own negligence or misconduct, or that of the witness Barnard. The latter portion of the charge was correct, except so far as placing the cattle and leaving them on the side track is called negligence. We have already seen that this was a deliberate, intentional act, constituting a breach of the contract, and in no sense negligence in its performance. Barnard was the superintendent of that portion of the defendant's road, and had the entire supervision of its business and control of its servants there. He sent a telegram to Brantford to detain all stock there, and forward other freight which would become subject to duty upon the expiration of the reciprocity treaty, which would occur the next Saturday night. The

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effect of the charge was, that if the jury believed that an illegal preference had been given to other freight, by means of which the cattle were detained at Brantford, and that this preference and consequent delay was caused solely by these orders of Barnard, they should find for the plaintiffs, otherwise for the defendant. Under this charge the jury must have found that the detention was caused by giving an illegal preference to other freight, and in addition thereto, that such preference was caused by the order of Barnard. The latter was an immaterial question. The accumulation of freight creating the obstacles testified to by defendant's witnesses, was principally at Fort Erie. The difficulty was in crossing the river from that point to Buffalo. No reason was shown for not continuing the cars containing the cattle in the respective trains to Fort Erie. The case further shows that defendant had a track running to a ferry at Black Rock, at which the cattle might have been crossed and saved. This might have been a little more expensive, but it was the duty of the defendant under the contract to have resorted to this, rather than let the cattle perish on the side track at Brantford. The judgment appealed from must be affirmed, with costs.

All concurred.

Judgment affirmed.

New Orleans, &c. R. R. Co. v. Tyson.

NEW ORLEANS, JACKSON & GREAT NORTHERN
RAILROAD COMPANY v. TYSON.

46 *Mississippi*, 729.

Railroad. Common carriers. Delivery of freight. In the absence of a special contract to that end or an established and well-known usage, a railroad company is not bound to deliver goods beyond its regular depot, or give notice of their arrival to the consignee.

Failure to notify. Where it is shown to be the well recognized custom of the company to give the consignee notice of the arrival of goods, it would be liable for such loss as might occur from failure to give such notice.

Measure of damages. The measure of damages in such a case would be the difference between the market value of the goods at the time when notice should have been given, and when it actually was given, or the fact of the arrival came to the knowledge of the consignee.

Duty of consignee. The consignee in such a case can not increase the liability of the company by refusing to receive goods because of delay or failure to give a customary notice, and a suit lies not for non-delivery of the goods, but for the neglect to notify.

Error to the circuit court of Copiah county.

Case sufficiently stated in the opinion.

N. P. Harris and *Yergers & Nugent*, for plaintiff
in error.

George L. Potter, for defendant in error:

TARBELL, J.—At the April term, 1868, of the Copiah county circuit court Allenson Tyson brought his action against the New Orleans, Jackson & Great Northern Railroad Company, for that, in 1867, the said Tyson, at Wesson, shipped upon the railroad of defendants, who were common carriers for hire, six thousand barrel

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hoop-poles, of the value of three hundred dollars, and two thousand half-barrel hoop-poles, of the value of one hundred dollars, to be carried to New Orleans, La., and there to be delivered to Smith & McKenna, for a reasonable charge, to be paid by Smith & McKenna, but the defendants, disregarding their undertaking in this behalf, and their duty as common carriers, so negligently and carelessly conducted themselves in regard to the said hoop-poles, that they did not deliver the said hoop-poles to the said Smith & McKenna, but, on the contrary, the said hoop-poles were wholly lost to the plaintiff, to his damage five hundred dollars. The defendant pleaded the general issue, with notice that they would prove the due arrival of the hoop-poles at their depot in New Orleans, of which fact they notified the consignees of plaintiff.

Upon the trial the testimony was conflicting as to the value of the hoop-poles, and as to the fact of notice of their arrival to the consignees. The jury returned a verdict for the plaintiff for the full amount claimed, and from the judgment thereon the defendants below prosecute this writ of error.

The declaration alleges an undertaking, on the part of the defendants, to deliver the hoop-poles to Smith & McKenna, and claim damages for a failure so to deliver. We regard this as material. 2 *Redf. on R.* § 157, p. 50. There was no proof upon the trial of an undertaking to deliver the goods to Smith & McKenna. Without a special contract they would not be bound so to deliver, unless in accordance with their custom. Delivery of freights at the end of routes to consignees is mostly confided to express companies, but was formerly, in some instances, undertaken by railroad companies, and is frequently done by other common carriers. There is no dispute in this case that the freight was promptly delivered at the depot of defendants. The testimony on the trial

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was as to the usual notice to the consignees of the arrival of the freight, and trial proceeded upon the theory that the plaintiff was entitled to recover the value of the property at the date of its delivery at the depot. Notice to consignees by railroads, of the arrival of freight, depends upon the custom of the company. *Redf. on R.* Such appears to be the custom of the New Orleans, Jackson and Great Northern Railroad Company, and hence it was their duty to give it in this instance. The action, however, is not in form for a failure to give this notice. The rule of damages adopted by the court and jury was as in case of non-delivery of freight; the neglect to give the notice being treated as equivalent to non-delivery of the goods. The goods were shipped in November. The consignor was in New Orleans to look after his property, the last of December or early in January, thereafter. On that occasion, as testified by one of consignees, a clerk of the firm was sent to the depot of defendants to look after the hoop-poles, which, he states, were found in an unmarketable condition, hoop-poles having declined fully one-half in price from the date of shipment to the time of such examination. The witness says, "had they been delivered in time, he could have obtained the full market value, from forty-five to fifty dollars." Both Smith & McKenna testify that they never received any notice of the shipment or arrival of hoop-poles from any one, until the arrival in New Orleans of the consignor. The clerk of Smith & McKenna testifies that they had received a letter from the consignor, advising them of the intended shipment, and another letter a few weeks after, inquiring if the poles had been received. The clerk states that he went to the depot on the arrival of the consignor, to see the condition of the poles, and found them unmarketable, owing to their long exposure and the fall in the market. This witness further says, "I would not take them in that

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condition, after having remained there so long without giving us notice, and pay what I thought the unjust charges made by the road.”

It appears from the testimony of Smith & McKenna that they employed several clerks, as McKenna speaks of George E. Raum, the last witness quoted, as “one of our clerks.” Only this one was examined as a witness on the trial of this cause. The agent of the defendants, whose duty it was to notify consignees of the arrival of freight at the depot, testifies that he left a notice of the arrival of the hoop-poles with a person writing at a desk in the office of Smith & McKenna, with a verbal request to attend to them and take them away. Upon the theory of non-delivery, the rule of damages followed was correct. We have been inclined, however, to consider this a case of damages for delay in giving notice to the consignees of the arrival of the freight. Smith & McKenna, the consignees, and their clerk, all testify to their refusal to receive the poles early in January, because of their unmarketable condition and depreciation of their market value, or fall in price from date of arrival to that time, a period of about six weeks, together with want of notice and high charges of freight; but depreciation in value or fall in market price is not a sufficient ground on which to decline to receive the property. If he tells the truth the agent of the company left two notices at the office of the consignees. One of these he says he left with some one writing at a desk in their office in their absence. Whether left on a desk in their absence, or with one of their clerks, it was sufficient. It might have been delivered to a clerk not a witness on the trial, as it seems they had several, of whom witness Raum was only one.

From an inspection of the record, we apprehend the true rules governing this case were overlooked or disregarded. The errors beginning in the declaration

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run through the entire trial and are embodied in the first instruction for the plaintiff, to wit: "If the jury believe from the evidence that the defendants received the poles in question as freight, at Wesson, to carry to New Orleans, La., and that they failed to give the consignees notice of their arrival in a reasonable time, and that thereby the poles were lost to the plaintiff, then they should find for the plaintiff and assess his damages according to the value of the poles at the time when the notice should have been given according to the evidence in this cause."

Upon the theory of delivery of goods or notice, the measure of damages was not the full market value of the hoop-poles on their arrival in New Orleans (there being in this case no question of their prompt transportation to the depot of defendants), but the difference between the then value, and their value (alleged to have fallen off greatly) at the date of notice to the consignees, upon the assumption that such notice was unreasonably delayed. It was, upon this theory, the duty of the consignees, upon notice, early or late, to receive the freight and sell it for such price as it would then command, crediting to the railroad company the proceeds; the difference between such sum and the amount which would have been realized when notice ought to have been given, being the damages which the company should make good to the plaintiff. It is a very extreme case which will warrant the refusal of freight on account of depreciation or fall in the price, because of or during delay.

In this case there was no demand and refusal, and no conversion of the property of plaintiff by defendants. The rule stated in case of delay is, therefore, the proper one. Any other in such case would be unjust and iniquitous, leading to frauds and perjuries innumerable. If depreciation is caused by delay, or prices fall pending dilatory delivery, and these causes could be made the ground of forcing freights upon

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railroads, they would become the forced purchasers of all the millions of property in the country whereof the market value fluctuates. See 2 *Redf. on R.* § 151, subd. 6, 7, 8; *Id.* 163, 164, § 173, subd. 2, 4; *Id.* § 175, subd. 2; *Id.* 146; *Sedgw. on Dam.* 406.

If we correctly interpret the instruction copied above, it assumes that notice was given to the consignees, but was not given in reasonable time. The instruction then proceeds to state the rule of damages thus: "That if, thereby, the poles were lost to the plaintiff, the jury would assess the market value of the poles at the time when the notice should have been given." According to the record, the poles were not "lost to the plaintiff," but only that they had depreciated, and the price had fallen. If there was non-delivery, the rule of damages would be as first above referred to; but in case of unreasonable delay in delivery, or in giving notice of arrival, the rule last mentioned would govern. Delivery or non-delivery, as of notice to consignees, or unreasonable delay in giving such notice, are questions of fact for the determination of the jury. Hence, both the above rules ought, perhaps, to have been stated to the jury as matters of law, with instructions, that, as they should find the facts, they would apply these rules. However, assuming the facts in the record to be correct, we are of the opinion that it was the duty of the consignees to receive and sell the hoop-poles, looking to the railroad company for the difference, as before explained; especially in view of the grounds upon which the refusal to receive the poles was put.

The letter from Wilks to the plaintiff, received in evidence, neither proved nor tended to prove any issue or fact in the case. It could not, possibly, have had any other effect than to prejudice the defendant's case. Its reception in evidence was, therefore, erroneous.

The judgment is reversed and the cause remanded.

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PEOPLE *ex rel.* HEMPSTEAD v. CHICAGO &
ALTON RAILROAD COMPANY.

55 Illinois, 95.

Railroads—of their duty as to delivery of freight beyond their own lines.

A railroad company cannot be compelled, as common carriers, to receive goods at stations along their line for transportation, on the requirement of the consignor that they shall, themselves, deliver the goods at a point beyond or off their own line of road, or to deliver goods received by them for transportation, at such point. The legal duty of the company in that regard is commensurate only with their franchise; it is confined to their own line of road, and cannot be made to extend beyond it.

Same—of their duty to acquire facilities to deliver goods beyond their own lines. Nor can a railroad company, chartered with certain express powers and privileges, with certain *termini* within which they are to be exercised, be compelled to purchase, for the accommodation of the public, more extended privileges beyond the limits of their franchise, so that they may deliver goods at points not upon the line of their road, or within its established *termini*.

So where it was sought to compel a railroad company to receive a quantity of grain at one of their stations, to be transported and delivered at a certain grain elevator in the city of Chicago, it appeared such elevator was situated upon a side or switch track which connected with the road of the company in that city, but was beyond its actual *terminus*. The side or switch track was constructed, owned and controlled by other companies, with whom the company against whom the remedy was sought, had no arrangement for its use, except as might be specially agreed upon in particular instances, though, under an ordinance of the city, that company could have compelled an arrangement for its regular and permanent use:—*Held*, the company could not be compelled to receive the grain to be delivered at such elevator beyond the *terminus* of their own road, nor could they be compelled to acquire the right to use the switch track leading from their road to the elevator for the purpose of such delivery.

Nor would the rights of parties in that regard be affected by the fact that such company had previously, in repeated instances, delivered

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freight at that elevator, by the use of such switch track running thereto but by virtue of special agreement to that effect.

In order to compel a railroad company to deliver grain, shipped on their road in bulk, at a particular elevator to which it may be consigned, it is indispensable such elevator must be connected by some track with the railroad line of the company, and be, in fact, a portion thereof, or such as would be regarded a portion thereof, for the purposes of such delivery, under the act of 1867, entitled, "Warehousemen."

Railroads—duty to carry grain in bulk. Railroad companies cannot disregard the custom which has obtained, of conveying grain in bulk over the lines of their own roads, and delivering it at any elevator thereon to which it may be consigned. If consigned to an elevator or warehouse not on their road, and beyond its *terminus*, or if there be no elevator on the road on which the grain is carried, then they may rightfully refuse to receive it in bulk.

Mandamus—whether awarded. A mandamus should never be awarded except the relator has a clear legal right to have the thing sought by it done, and in the manner and by the person or body sought to be coerced, and must be effectual as a remedy if enforced, and it must be in the power of the party, and his duty also, to do the act sought to be done—the writ confers no new authority upon him, and the duty must be a public one, and must be imperative and not discretionary.

Mr. Justice SHELDON holds, that so long as a railroad company actually makes use of the track of another company, leading from their own road to an elevator, in running their cars, it is their duty to deliver grain there, under the rule in Vincent's case, 49 Ill. 33.

Mr. Justice SCOTT is of opinion, it was the duty of the company in this case to receive the grain and to deliver it to the elevator designated, but that the remedy is not by mandamus, there being another complete remedy.

Mr. Justice WALKER holds, that mandamus is the proper remedy to compel a railroad company, when it is their duty to do so, to carry grain in bulk and deliver to the elevator to which it is consigned; also, that when a road enters the city of Chicago, the company should deliver grain there at any elevator to which it may be consigned, either upon their own road, or upon the road of any other company with which they have running arrangements, unless in so doing they would incur unreasonable expense; but that a company cannot be compelled to construct or acquire facilities for such delivery beyond their own line.

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This was an application, in the name of the people, on the relation of Edward Hempstead and Calvin T. Wheeler, for a writ of mandamus, to compel the Chicago & Alton Railroad Company to receive, at one of the stations upon the line of their road, a quantity of grain in bulk, to be delivered by the company at the elevator of the relators, in the city of Chicago. The company had refused to receive the grain for transportation, because it was consigned to that elevator. The reasons for such refusal are set forth in their return to the alternative writ, and will be found in the opinion of the court.

Messrs. *Goudy & Chandler*, and Messrs. *King, Scott & Payson*, for the relators.—The duty of the Chicago & Alton Railroad Company in the premises, and the right to recover damages at law, or inflict the penalty prescribed by the statute, was settled by this court at the last term. *Vincent v. C. & A. R. R. Co.*, 49 *Ill.* 33.

The railroad company will be compelled by mandamus to perform its corporate duties and to receive and deliver all goods as directed.

“No better general rule can be laid down on this subject than that where the charter of a corporation, or the general statute in force and applicable to the subject, imposes a specific duty, either in terms, or by fair or reasonable construction and implication, and there is no other specific or adequate remedy, the writ of mandamus will be awarded.” 2 *Redf. on R.* 279.

A mandamus has been awarded to compel a railroad company to run its cars to a particular point, and there to receive and discharge passengers. *State v. Hartf. & N. H. R.*, 29 *Conn.* 538; *People v. Albany & Vt. R.*, 24 *N. Y.* 627.

It has been ordered to compel a turnpike company to fence its road. *Reg. v. Trustees Luton Roads*, 1

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Q. B. 860. To restore a highway to its former width. *Reg. v. Birming. & Glou. R.*, 2 *Rail. C.* 694. To establish a uniform rate of tolls. *Clarke v. L. & N. Union Canal*, 6 *Q. B.* 898. To build a bridge. *Cam. & Som. v. Charleston R.*, 7 *Metc.* 70. To reinstate its road after the rails have been taken up. *Rex v. Severn Wye R.*, 2 *B. & A.* 646. To bridge a private way. *Habersham v. Sav. Canal*, 26 *Geo.* 283.

A mandamus was applied for to compel a railroad company to receive the goods of the relator, and only refused upon the ground that the company was not, by its charter and custom, carriers of that kind of goods. *Exp. Robbins*, 7 *Dowl. P. C.* 586; 2 *Shelf. on R.* 846.

The law is discussed, and many cases referred, to in *Moses on Mandamus*, 155, 168, 171, 176; 2 *Redf. on R.* 257, 275, 294.

Mr. A. W. Church, Mr. J. H. Howe and Mr. George C. Campbell, for respondents.—The relators, in order to entitle them to the issue of the writ, must show a clear and indisputable legal right to have the thing sought by it done, and in the manner and by the person or body sought to be coerced, and the writ must be effectual as a remedy, if enforced, and it must be in the power of the party, and his duty, also, to do the act required by the writ. *People v. Forquer*, *Breese*, 104; *People v. Gilmer*, 5 *Gilm.* 242; *Canal Trustees v. People*, 12 *Ill.* 248; *People v. Hatch*, 83 *Id.* 140.

It cannot be claimed that the relators, at common law, are entitled to have the respondents' cars delivered at their elevator, because, while the elevator is connected with respondents' road by side or switch tracks, yet it is situated beyond the *terminus* of their road, and they have never acquired the right to use such side or switch tracks, and cannot properly be compelled to acquire that right. *Vincent v. Chi. & Alton*

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R. R. Co., 49 *Ill.* 33; Porter v. Chi. & R. I. R. R. Co., 20 *Id.* 410; 1 *Redf. on R.* 66.

If relators have no common-law rights to be enforced by the issue of this writ, they must show some statutory right, the infringement of which requires the interference of this court, and must rely on the statute of the State of Illinois, approved March 11, A. D. 1869, and here we object to the issuance of the writ to enforce the rights claimed under this act, because,

First. The statute itself has provided a specific and adequate remedy for an infringement of its provisions. The penalty imposed by the statute is so heavy that no corporation could afford to violate the provisions of the act if that penalty were enforced against it. See act March 11, A. D. 1869.

Second. Where a new right, or the means of acquiring it, is conferred by a statute, and an adequate remedy for its invasion is given by the same statute, parties injured are confined to the statutory redress. *Smith v. Lockwood*, 13 *Barb.* 217; *Hare v. Steamer Hamburg*, 2 *Clarke (Iowa)* 460; *Dudley v. Mayhew*, 3 *N. Y.* 15; *Miller v. Taylor*, 4 *Burr.* 2305; *Crosby v. Bennett*, 7 *Metc.* 17; *Craig v. Butler*, 9 *Mich.* 21; *Thurston v. Prentiss*, 1 *Id.* 193.

Third. The act of March 11, 1869, is a violation of the chartered rights of the respondents, as granted by the legislature of the State of Illinois, and is therefore unconstitutional and void. By the acceptance of their charter, respondents entered into a contract with the people of the State of Illinois, through the legislature, to build, operate and maintain a railroad from Joliet to Chicago. They did so build a railroad, and fixed its terminus at Madison-street, south of the relators' elevator. Having so fixed its terminus, and complied with their contract in that regard, they are not bound to perform the duty of common carriers beyond the terminus of their railroad, and not even the legislature

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can compel the respondents to carry goods beyond the terminus of the line over which they profess to be common carriers.

The statute violates the chartered rights of respondents in that it attempts to fix and prescribe the rates which the respondents must charge for doing this particular service, when, by the respondents' charter, the right was granted to respondents to fix their own tolls.

Any law which attempts to alter the duties imposed by the terms of respondents' charter, or to vary the terms of respondents' contract with the people of the State, is in repugnance to the constitution of the United States, and is therefore null and void. *Brigham v. Agricultural, &c. R. R. Co.*, 1 *Allen*, 316; *Hatch v. Vermont Central R. R. Co.*, 28 *Vt.* 142; *Buffalo, Corning and N. Y. R. R. v. Pottle*, 23 *Barb.* 21; *Hentz v. Long Island R. R.*, 13 *Id.* 646; *Walker v. Mad River & Lake Erie R. R.*, 8 *Ohio*, 38.

The relators' elevator is located beyond the terminus of the respondents' road, and they could not obey the writ if issued, if they were forbidden so to do by the railroad companies owning the tracks in Water-street, in the city of Chicago, over which the respondents' cars must pass in order to reach the elevator.

But the relators assert that, by virtue of the fourth section of an ordinance of the city of Chicago, passed August 16, 1858, under which certain railroad companies were authorized to lay down the tracks which lead from respondents' road to the elevator in question, the respondents have the right to use those tracks. That section is as follows:

"Sec. 4. Said companies may associate with themselves, in the construction and use of such tracks, any and all corporations, and any railroad corporations so associated shall possess all the powers herein granted to the said Pittsburgh, Fort Wayne & Chicago, and

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the Chicago, St. Paul & Fond du Lac Railroad Companies, and said latter companies shall allow and permit the use of the tracks constructed under this ordinance, by any other railroad corporations, upon such terms and conditions as shall be fair and equitable, to be determined, in case of disagreement between the companies, by two disinterested and competent civil engineers, one to be selected by each party, and in case of their disagreement, a third shall be appointed by the judges of the Cook county court of common pleas, and the award and decision of said referee shall be final, conclusive and binding upon the parties."

The court will see that the ordinance confers no such right. It merely provides that the railroad companies to whom the right to lay down tracks in West Water-street is given, *may* associate with them in the construction and use of said tracks any other corporations, and they shall allow and permit the use of said tracks by any other railroad corporation upon terms and conditions to be agreed upon, and a manner is provided for settling those terms and conditions in case of disagreement between the parties. Relators do not allege that any agreement has ever been entered into by respondents for the use of said tracks, and respondents expressly deny, in their return, that any such agreement was ever made by them. Respondents have never exercised the option given them by the ordinance, and until they do so, they have no rights in West Water-street, except such as are specially granted from time to time by the railroad company owning the same. Before a writ of mandamus to deliver cars at the relators' elevator can be made effective, this court must compel the respondents to acquire a right they do not now possess, and as it would be out of the power of respondents, in case the Pittsburgh, Fort Wayne & Chicago Railroad Company, or the Chicago & Northwestern Railroad Company, objected, to obey the writ,

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the writ ought not to issue. *Exp. Black*, 1 *Ohio St.* 30; *Turnpike Road v. Sandusky*, *Id.* 149.

The respondents, as common carriers, are not bound to carry goods beyond the terminus of their own line. They may do so by special contract for that purpose, but the fact that the respondents have sometimes carried, by special contract, goods beyond their own line, does not entitle any one to demand that they shall perform similar service whenever he shall think proper to ask it. *Johnson v. Midland Railw. Co.*, 4 *Exch.* 369; *Oxlade v. Northeastern Railw. Co.*, 1 *C. B. N. S.* 455; *Same v. Same*, 15 *Id.* 680.

Nor are the respondents obliged to receive goods for a point beyond their own line, when the shipper insists, as a condition precedent, that they shall receive them with an undertaking, either express or implied, that they shall be taken in respondents' own cars to a point on the line of a railroad owned by another company; and therefore respondents had the right to refuse the cars of grain at Odell, mentioned in the alternative writ, when the shipper insisted that they should sign a receipt, the effect of which would be to contract to deliver the cars at the relators' warehouse.

If the object of this writ be simply to compel the respondents to receive and transport grain to Chicago, the respondents will not object to its allowance, provided the grain be tendered to respondents in packages proper for transportation.

For the respondents are not bound, as common carriers, to receive any goods for transportation unless the same are delivered to them in safe packages, properly secured against loss in transportation, and convenient for handling and delivering. The carrier is not bound by law to furnish to the shipper the packages in which his goods are placed for transportation. If he does so receive them, he has the right to make any stipulation with the shipper as to the manner in which

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goods so unpacked shall be delivered at its terminus, and if he furnishes the packages in which said goods are packed, he has an undoubted right to require that the shipper shall submit to such reasonable conditions as the carrier chooses to impose, which shall insure the carrier as far as practicable in the safe transmission of the goods, and secure the speedy return to the carrier of the packages so loaned by him to the shipper. Grain in bulk is not properly packed for transportation, and the carrier is under no obligation to receive from any one, grain, unless the same is placed in strong, safe sacks, convenient for speedy handling, and delivery at the usual and ordinary depot prepared by the carrier for the purpose of receiving and delivering goods. *Betts v. Farmers' Loan & Trust Co.*, 21 *Wis.* 80.

BY THE COURT.—BREESE, J.—This is an application for a peremptory mandamus, on the relation of Edward Hempstead and others, against the Chicago & Alton Railroad Company.

In the petition of relators, it was prayed that a writ of mandamus issue, directed to this company, commanding them, their agents, officers and employees, to receive all grain which might be delivered to them at any of their receiving stations on the line of their road, consigned to the elevator of relators, and known as the Illinois River Elevator, in the city of Chicago, upon the payment of the usual and customary charges, without unfavorable discrimination, and to deliver all such grain at that elevator in due course of business and without unreasonable and unnecessary delay; and also commanding the agents, officers and employees of this company to receive and transport three certain car loads of corn from Odell to Chicago, and to deliver the same at this elevator, or show cause why they refuse so to do.

Respondents, by way of showing cause, have made

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an elaborate return to the writ, to which the relators have demurred, thus opening to our consideration the whole merits of the controversy.

It is not denied that relators own and operate the elevator, as alleged, and that they have all the necessary machinery and conveniences for the purposes to which it is devoted, nor is the fact denied that respondents own and operate the Chicago & Alton railroad from East St. Louis to the city of Chicago, but they do deny that they are common carriers to the extent set up and claimed by the relators. The relators claim, that to and from East St. Louis, and all points intermediate that and the city of Chicago, on the line of their road, it is their legal duty to receive all goods and freights delivered to them at any station on their line, and to transport the same to such stations and places as may be directed by the consignor, for a reasonable price or reward, and to deliver them to the person or persons to whom they are directed to deliver them, and that it is also their duty to deliver all grain received by them in bulk into the warehouse to which it is consigned, and that it is unlawful for them to deliver any grain into any warehouse other than that to which it is consigned, without the consent of the owner or consignee thereof.

The claim of the relators reaches to this extent. The objection to such a pretension is very obvious. It does not confine the legal duty of respondents to their own line of road. Beyond that this court has no power. Their duty is commensurate with their franchise, and cannot, by this court, be made to extend beyond it, and the demurrer admits that the south line of Madison-street, as stated in the return, is the limit to which their franchise extends, while the elevator is north of that point some five hundred feet or more, entirely without the limits of respondents' charter.

But the relators say that a railroad track is laid

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down on West Water-street, running by the elevator with a switch, by which the elevator can be approached to load and unload cars, and which track was laid under an ordinance of the city of Chicago, passed August 16, 1858, but that the particular part in front of the elevator and the switch were constructed by the Pittsburgh, Fort Wayne & Chicago Railroad Company, and that, by the fourth section of that ordinance, respondents have the right to use this track, and, in fact, do use it; that they run all their cars upon a part of the track constructed under this ordinance to reach their depots, and a run of five hundred feet beyond their passenger depot would bring the cars to relators' elevator.

To this it is answered by respondents, that they have never acquired any right to run their own cars north of the south line of Madison-street, the terminus of their railroad, and that none of their engines or cars have the right to pass north of this south line without obtaining permission of the railroad companies owning them, and paying to them such sum as may be charged for their use. And they further say, they have no right to send their cars over the tracks leading to this elevator without special permission, and upon paying the owners of the tracks compensation therefor, and that they have never held themselves out to the public as common carriers beyond the *termini* of their own line of road, and that whenever their cars have been permitted to go beyond the terminus of their road, it has been done by virtue of special agreements made to that effect; and they further say, they have never accepted the provisions of the ordinance of August 16, 1858; that while it may be true, as alleged, the Pittsburgh, Fort Wayne & Chicago Railroad Company, and the Chicago, St. Paul & Fond du Lac Railroad Company, did construct the tracks from Van Buren to Kinzie-street, it

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is not true that respondents had any part in their construction, or have availed of the provisions of the fourth section of that ordinance for the use of the tracks so laid north of the south boundary line of Madison-street; nor have they ever acquired, by agreement or otherwise, as provided by the terms of that ordinance, any right to run their trains north of that line, nor have they had anything to do with the construction of any side or switch track connecting with any railroad track north of that boundary line in West Water-street, or in any other street in Chicago north of Madison-street.

Here, we think, is presented the pith of this controversy. The facts are admitted by the demurrer to be true, and the question is, can a railroad company, chartered with certain express powers and privileges, with certain termini within which they are to be exercised, be compelled to purchase, for the accommodation of the public, more extended privileges beyond the limits of their franchise.

In the case of Vincent against this same company, 49 *Ill.* 33, we took occasion, in defining the duties of common carriers as to delivery of articles carried, imposed by the common law, to advert to the relaxation of that rule in regard to railways.

We there said, the rule of the common law, requiring common carriers by land to deliver to the consignee, has been so far relaxed in regard to railways, from necessity, as in most cases to substitute, in place of a formal delivery, a delivery at the warehouse or depot provided by the companies for the storage of goods, and that the decisions of this court, that a railway company may discharge themselves of their liability as common carriers, by safely depositing goods in their warehouse, and there holding them under the responsibilities of a warehouseman until demanded by the consignee, proceed upon the ground

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that a railway has no means of delivery beyond its own lines.

We consider this quotation very apposite in the present case, for it is admitted by the pleadings, that relators' elevator is not on the line of respondents' railway, and that they have no connection with it, or use of it, except such as they acquire by purchase when their own necessities or interests demand its use.

And in remarking on the custom which had grown up in this State, of carrying grain by rail in bulk, it is said, since it would be impossible for railroad companies to unload and store grain so brought, at their ordinary freight depots, a custom of delivering it at elevators has obtained, to which it may be consigned, but it is indispensable such elevators must be connected by some track with the railroad line, and be, in fact, a portion thereof, for such we understand to be the meaning of the opinion in that case. It could not be understood that, although these respondents have connections by sidings or switches, or other contrivances, with other roads running into Chicago, they should be compelled to use them to reach an elevator upon such road situate, it may be, miles beyond the *terminus* of their road, and not on the route of their own road. We know of no power which can compel a railroad company to exercise its franchise beyond its own *termini*. Within those limits, this court can exercise a supervisory power over them, and, as in Vincent's case, enjoin them. That proceeding was upheld, because the siding to their elevator was a part of the track of the respondents. In commenting upon the act of the legislature of February 22, 1867, entitled, "Warehousemen," in answer to the argument of the respondents, that the act did not mean that railway companies shall deliver grain at points off their line, the court said, clearly it does not, but the question recurs—what points are to be considered on

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the line of a railway for the purposes of delivery under this law! They contend that its line consists of its main track, and such side tracks as may belong to it. The court said; when a railroad, for a valid consideration, has allowed the owner of adjacent land to lay a side track connecting with its own rails, and, as in the case then before it, had permitted the connection to be made, and the side track to be laid for the use of a particular lot of ground, and in order to transport to such lot heavy articles, and the owner of the lot and side track has his warehouse in readiness for the receipt of such freight, then such side track must be considered as a part of its line for the purposes of delivery under the statute.

In the same opinion, it was conceded that a railway company could not be required, by legislative enactment, to transport freight beyond its own line.

This, we think, settles the matter in dispute between these parties, unless an additional obligation has been imposed upon these respondents by the ordinance of the city, of August 16, 1858.

It is admitted by the pleadings that respondents had no agency in constructing the tracks which pass by this elevator, and have never availed of the provisions contained in that ordinance, and have never authorized or permitted a connection with their line of road of any switch or side track constructed on the street in which this elevator is situate, and it is further admitted that the lawful northern terminus of their road is the south line of Madison-street.

If, then, by legislative enactment, a railroad company cannot be compelled to transport freight beyond their own line, with what propriety can it be urged that a permission to use tracks which they were not instrumental in connecting with their line, and which are beyond their terminus, and the property of other parties, shall have a greater effect than a legislative enact-

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ment? Does the permission of the city authorities to use these tracks impose an obligation on the respondents to use them? If the legislature, with its vast powers, cannot so compel them, it would be strange, indeed, if the act of a subordinate authority should have that effect. The ordinance cited can have no other effect than to legalize a departure from their line of road, should the respondents desire to do so. Relators allege that respondents have the right to use this track, and, in fact, do use it; that they run all their cars upon a part of it to reach their depots, and a further run of five hundred feet beyond their passenger depot would bring them to this elevator. As a general fact, we believe cars with heavy freights, like grain in bulk, do not make the depot for passengers their stopping place. They usually stop at the freight depot, and that, judging from the diagram attached to the return, the accuracy of which is not questioned, must be more than five hundred yards south of this elevator. The fact that the respondents use this track is not denied in the return, but the respondents say, and that is admitted by the demurrer, that all these tracks laid in West Water-street, and north of Madison-street, are owned exclusively by the Chicago & Northwestern and the Pittsburgh, Fort Wayne & Chicago railroad companies, who control the manner of using them, and charge track service for every car run over them by respondents, and by other railroad companies. The respondents further say, and this is also admitted, that although they may have delivered coal over that switch, to that elevator, they have never done so except by special agreement made for that purpose.

That a railroad company may, by special agreement run their cars over the track of another, is not doubted, but that they can be compelled to do so, is not and cannot be admitted. If the ordinance of August, 1858, intended a favor to this and other companies, still, the

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companies cannot be coerced to accept the favor. So long as they perform their duties under the privileges and powers granted them, the people have no right to complain. To compel a railroad company to receive and deliver freight at points off and beyond their own line, would be not only oppressive, and involve their business in inextricable confusion, but would impose burdens and responsibilities upon them which they never contracted to assume. A reference to the diagram accompanying the return of respondents, and to which we have before referred, taken in connection with the statement in the return, which is admitted to be true, it will be seen, that all the tracks leading into West Water-street belong exclusively to the Pittsburgh, Fort Wayne & Chicago Railroad Company, while those owned by these respondents jointly with that company, as also those owned exclusively by respondents, all terminate at or near the south line of Madison-street. The question, then, becomes pertinent, should a mandamus be awarded, how could respondents obey it? Could they, without the permission of the first named company, run their cars over their tracks? Could the writ command them to purchase the right to run them, of that company? Can a writ of mandamus be made to perform such an office? Would this court be justified in so trenching upon the rights and franchise of the Pittsburgh, Fort Wayne & Chicago Railroad Company? They have chartered rights which cannot be infringed so long as they properly perform their duties under their contract, and it would be going to an unwarrantable extent, in order to compel one company to perform a supposed duty, to trespass upon the chartered privileges of another.

This court said, in *People v. Hatch*, and the Same *v. Dubois*, 33 *Ill.* 9, at page 140, that a mandamus should not issue in any case unless the party applying for it shall show a clear legal right to have the thing

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sought by it done, and in the manner and by the person or body sought to be coerced, and must be effectual as a remedy if enforced, and it must be in the power of the party, and his duty, also, to do the act sought to be done, and is never awarded unless the right of the relator is clear and undeniable, and the party sought to be coerced is bound to act. And in *People v. Gilmer*, 5 *Gilm.* 242, it was held, that a mandamus could only be issued to compel a party to act, when it was his duty to act without it—that it conferred upon him no new authority. And the duty must be a public one, and must be imperative and not discretionary. *Tapp. on Man.* 65. This has peculiar application to the fourth section of the ordinance, so much insisted upon by relators. That section nowhere confers any rights upon respondents. As we understand its terms from respondents' brief, the ordinance not being before us, it provides, only, that the railroad companies, to whom the right to lay down tracks in West Water-street is given, may associate with them in the construction and use of said tracks any other corporations and shall allow and permit the use of said tracks by any other railroad corporation upon terms and conditions to be agreed upon.

It is admitted by the pleadings, that no agreement was ever made by the respondents for the use of these tracks. By the ordinance, it is discretionary with the companies to make such agreements. This court cannot compel respondents, if application was made to it, to enter into an agreement to use them. It is not their duty to make an agreement, it is a privilege, only, and, consequently, the court cannot compel respondents to use these tracks, or any one of them. In short, it cannot coerce a party to do what the law does not oblige him to do. Granting the writ would confer no power or authority upon respondents to enter upon and use these

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tracks. A plain dereliction of duty must be established before a mandamus can be awarded.

The ground of the decision in Vincent's case was, that the side track, under the circumstances attending its construction, became a part of the track of the railroad company, and they were, therefore, bound to deliver grain, carried by them in bulk, in the warehouse erected upon it, when consigned to such warehouse.

The return in this case shows, and the fact is admitted by the demurrer, that the respondents have provided, by contract with other parties, a warehouse on their own track, ample in capacity to contain all grain ordinarily transported in bulk over their line of road, having all the necessary machinery and appliances for speedily receiving, unloading and returning the cars in which it is transported, and have guarded consignors of such articles against imposition, by a covenant that the charges made at such warehouse shall not exceed those of other warehouses in the city of Chicago. A delivery, therefore, of grain in bulk to such a warehouse, if not consigned to any other warehouse on the line of their road, would be a fulfillment of the obligation resting upon them to carry and deliver such freight.

So long as no discrimination is made by railroad companies between warehouses on their line of road, shippers can have no real cause of complaint. So long as their grain is properly handled and stored, and at the usual charges, it can make but little if any difference to them by whom those services are performed, or where, and if no warehouse upon the line of a railroad is designated by the consignor as the recipient, and as a delivery cannot be made at the usual freight depot, what can be more reasonable and proper than a delivery to the warehouse they have furnished upon their own track, that being in all respects ample for that purpose? *Porter v. Ch. & R. I. R. R. Co.*, 20 *Ill.*

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407. As they cannot be compelled to transport the grain beyond their track, or off it, so neither can they be compelled to receive it for such purpose. There is nothing in the warehousing act of 1867 opposed to this. Section 22 of that act clearly implies, that the warehouses designated by the consignors shall be upon the track of the road on which their grain is carried, and within the limits of its franchise. It never could have been the design of the act to compel one road to trespass on the chartered rights of another, or to purchase a privilege of the other.

It is urged by the respondents, in support of their return, that they have a right to refuse to receive grain in bulk, to be carried on their road, and can demand it shall be placed in proper packages, convenient for handling and storage in their cars, and for unloading.

When we consider the vast amount of grain annually produced for market in the rich country through which this road passes on the way to the great grain market of the West, the difficulty, if not impossibility, of providing sacks, barrels, or other safe contrivances to secure properly this production for shipment, is quite apparent. This led to the establishment of costly elevators, and they induced the custom, which has obtained with all railroads, in this State, at least, to receive grain in bulk, it being equally as well protected in that condition in its transit by cars as in sacks, and as speedily unloaded from them, by means of the steam power and appropriate machinery employed by them. These erections have had the same powerful influence upon the production of wheat, one of our great staples, as the introduction of the reaper, for without the agency of the latter, those vast fields yearly blossoming with this product, would be devoted to other purposes, and but for the steam car and the elevator, if cultivated up to the limit of their capacity, their products could find no market. Hand in hand,

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these powerful influences are at work, and so long as the two latter make no unjust discriminations, and are satisfied with moderate charges, the stimulus to the agricultural interest will be unceasing, and nothing will be wanting to make this the great grain-growing State of the West, if not of the Union.

We are not of opinion that respondents, or any other railroad company, can disregard the custom of conveying grain in bulk over the line of their own road, and delivering it at any elevator thereon, to which it may be consigned. If consigned to an elevator or warehouse not on their road, and beyond their terminus, or there be no elevator on the road on which the grain is carried, then they may rightfully refuse to receive it in bulk.

The facts stated in respondents' return, and the legal consequences flowing from them, for the reasons we have given, afford a complete justification for the refusal to receive the grain in question, the elevator to which it was consigned not being on their road, or within the limits of their franchise. We have examined all the cases to which reference has been made, and we are well satisfied the views here expressed conflict, in no particular, with any of them.

The demurrer to the return must be overruled.

Mandamus refused.

SHELDON, J.—I hold, that so long as the respondents actually make use of the track leading to the relators' elevator, in running their cars over it, it is their duty to make delivery of grain there, under the rule laid down by this court in the case of *Vincent v. C. & A. R. R. Co.*, 49 *Ill.* 33.

SCOTT, J.—I concur in denying the peremptory writ in this case, on the ground, that the writ of man-

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damus is not the appropriate remedy for the wrong complained of. When the law affords another and complete remedy, I understand the law to be well settled, that a writ of mandamus will never be awarded. On the state of facts presented by this record, the law furnishes a complete and ample remedy to the party injured.

Without discussing the case at length, I am of opinion, on the facts presented in the record, that it was the duty of the railroad company to receive the grain in question, and deliver it at the relators' warehouse, and for that purpose the company had the clear right to use the track in question, and for a failure so to do, they are liable in any appropriate common-law action.

WALKER, J.—I concur in the opinion announced in this case, but hold, that respondents, and all other railroad companies in the State, may be compelled by mandamus, when a proper case is made, to carry grain in bulk, if such is the customary mode of transportation, and to deliver it to any elevator on the line of their roads, or upon any of their side tracks or switches, to which it may be consigned; and when such roads enter the city of Chicago, they should deliver grain therein in the same manner, when so consigned, on their own tracks, side tracks or switches, and at the elevators to which consignments are made, on other roads in the city with which they have running arrangements, unless they would be compelled to incur unreasonable expense in making such delivery. But they are not, nor can they be, required to construct new side tracks or switches, or extend the line of their roads, or to make running arrangements with other roads, or to purchase or lease other roads for the purpose of making such delivery.

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68 *Pennsylvania*, 272.

Common carrier may bind himself to transport goods beyond his own route and thus become responsible for the default of those he employs to carry the remainder of the distance ; but the proof of the contract should be clear, especially when it would contradict the papers accompanying the transaction.

Error to the court of common pleas of Warren county.

E. H. Berry brought an action of assumpsit against the Pennsylvania Railroad Company (which is lessee of the Philadelphia & Erie Railroad), for the loss of household goods stolen from a car in which they had been placed for transportation from the town of Warren to Tidioute.

The writ was issued November 20, 1868, and the case was tried, September 13, 1870, before JOHNSON, P. J.

The goods lost, with their value, as testified to by plaintiff's witnesses, were as follows :

Cask of china	\$125.00
Box of books and pictures	100.00
Table, \$5 ; 5 cane chairs, \$1.50 each	12.50
3 hair cloth chairs, \$6 each	18.00
1 green reps. Greenland serges	10.00
3 kitchen chairs, \$1 each	3.00

The goods had to be transported on the Philadelphia & Erie Railroad to Irvineton, thence on Oil Creek & Allegheny Valley Railroad to Tidioute.

The plaintiff testified that on April 1, 1868, he made a contract with Gemmil, the agent of the defendants, to transport his goods to Tidioute without change of

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cars, and selected a car of proper gauge to go on the other road; the goods to be charged more on that account. On the 3rd of April the car was at Irvineton; on the 4th, Saturday noon, it was at Tidioute; he paid charges there, but could not discharge that day; the clerk and plaintiff looked into the car, all was dry and right. On Monday he again deferred unloading. On Tuesday he unloaded, and worked till night without taking out all the goods; locked the car and left. On Wednesday he missed the articles mentioned in the list: on that morning nothing appeared to be disturbed. On Saturday he saw the box of books, dining-table and box of bedding in the car, but did not see the cask of china. He gave other evidence of the loading of the goods and their value. Gemmil, the agent of the defendants, testified that the plaintiff wanted a car to go through and not require the goods to be transferred; witness got him one loaded. On cross-examination he said he gave a receipt to Waid, whom the plaintiff had employed to haul the goods to the car, and took a release from Waid. The defendants had business arrangements with the other company, to run to and over their road, and collect track freights; the arrangement was, if there was one car only used, the freighter was to pay car service; the plaintiff wanted a car that would save the transfer of the goods. Witness made no arrangement that the defendants should carry the goods to Tidioute.

The defendants gave in evidence Waid's release to defendants for a "lot of H. H. goods from Warren station to Irvineton, consigned to E. H. Berry, Tidioute," and to all other companies over whose line the goods should pass, from damage from leakage, decay, chafing, breakage, damage by fire or from any other cause not the result of the collision of trains or of the cars being thrown off the track. This contract to be

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executed by shippers of light furniture, household or miscellaneous goods.

The manifest was dated April 3, 1868, viz:

"Merchandise forwarded from Warren to Irvineton;" "Marks; Tidioute, Pa."—"Consignee; E. H. Berry"—"Description; lot of H. H. goods (released)"—"Amount of freight \$7"—"expenses \$1"—"To be collected \$8."

The manifest went with the goods and car.

The receipt stated that "as part of the consideration of the contract," the defendant should not be responsible (amongst other things), for theft, nor in any event for more than fifty dollars; when goods are intrusted to any other company, that company shall be regarded exclusively as the agent of the owner and alone reliable. The responsibility of the company to commence with the shipment and terminate with unloading the car. The receipt attached was as follows:

"Received of E. H. Berry the following, contents and conditions unknown, to be carried and delivered upon the terms, and according to the agreement above specified, at the Irvineton station of the above railroad.

Marks.	No. and Alleged Contents.
E. H. Berry,	Lot H. H. Goods.
Tidioute.	Released."

The defendant further gave evidence that the car and goods arrived at Irvineton between ten and eleven o'clock A. M. of April 3, and the car was transferred to the other road about two P. M. of the same day. Also, that when the plaintiff came to see about the goods he was told they would have to be rehandled and transferred unless he was willing to pay car service, and to that he agreed; the car was loaded nearly full between the doors, the chairs being on top. Plaintiff looked at

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the car at Tidioute on Monday, there was no reason why he might not have taken them that day.

The plaintiff's points were :

1. Whether the defendant did or did not contract to deliver the goods in suit at Tidioute, they are responsible for any loss occurring while the goods were in their custody ; and the goods having been received by defendants and lost, they can only exempt themselves from liability by showing to the satisfaction of the jury that the loss occurred after their custody had ceased.

2. The defendants having received the plaintiff's goods, and the same being lost, the presumption of law, in the absence of proof to the contrary, is that they were lost through the default of the defendants.

The court, after referring to the facts, said : . . .

"Now, from this state of facts, the plaintiff asks you to say that the defendant entered into a special contract with him to transport these goods to Tidioute and is therefore liable to him for the larceny committed upon them during their transit.

"In addition to the evidence mentioned, it was also shown and not denied that these two roads were connecting roads and had business arrangements by which freight was received at any point on the one to be transported to any point on the other, with and without change of cars, and that in such cases, as in this one, the charges are not to be paid to the several roads over which the goods pass in their transit, but paid in gross at either end of the route to either, each road charging the other for the amounts so received.

"Inasmuch as this transaction was not put in writing, it is for you to say whether the Pennsylvania Railroad Company did undertake by contract, express or implied, to transport the plaintiff's goods to Tidioute or only to Irvineton. The agent here distinctly disavows the intention of making any contract that would

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bind his principal, the defendant, further than Irvineton for the safety of the goods.

"If the transaction was such as to create an obligation on the defendant to carry the goods to their destination, either by its own motive power or that of another, then it would be liable for losses occurring as this one did.

"It is not questioned but that the agent here had power so to contract and bind the company, and we say he had the power.

"Did he, by contract express or implied in the peculiar character of this transaction, so engage? It was out of the usual course of business. The usual bill of lading itemizing the goods received, specifying Irvineton as the end of their liability therefor, and the usual precautionary conditions and exemptions from liability, was omitted in this instance, and it was agreed for a consideration, that the defendants' car should carry the goods to their destination without transshipment.

"Does all this contain an express contract, or the legal implication of one, that the defendant would transport the goods to Tidioute and deliver them safely to the consignee, who was the plaintiff himself? If so, of course it would be bound to do so, or be liable for not doing so, unless excused by some sufficient reason.

"Just here come in the points to which the plaintiff's counsel has invited our attention: . . .

"I think the doctrine presented in these points is essentially correct. The plaintiff put the goods into the custody of the defendant—an admitted common carrier—and fails to receive them again. He has no knowledge or means of acquiring knowledge of how they were lost.

["I think the burden of proof is on the defendant to show by what means they were lost, or at least to show affirmatively that it was not through any default

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or negligence of its agents, or while the goods were in its possession or custody.]

"This is independently of the fact whether the defendant was bound by contract to carry them itself to Tidioute or see that it was done. If this be correct, then it becomes your duty, in case you are not satisfied there was a contract, to inquire, whether the defendant has shown satisfactorily that the larceny of the goods was not committed until after they passed out of its possession and control, that is, not until after they were received and taken into custody by the O. C. & A. R. R. Co. If not, then the defendant would be responsible for the deficiency. Having charged and collected pay for the faithful and full performance of duty at the end of the route, no less should be required of it than to show affirmatively where and how the loss did occur, to exempt itself from the legal presumption of negligence, and afford the plaintiff the means of redress.

["A formal receipt of another party, taken in the usual course of business, upon the transfer of goods, is not sufficient, especially when the evidence does show affirmatively that no itemized bill of lading accompanied them and no examination of them was made to discover the fact of loss. The receipt of the receiving company, given under such circumstances, would not be conclusive.]

"The question of the liability of a railroad company for goods billed and shipped to a point beyond the terminus of its line of road, is not fairly raised in this case, because there was no bill of lading or receipt given. Where there is a business connection between the different companies throughout the route, and the consignor has reason to believe that the company to whom he delivered the goods held themselves out as responsible for the entire route, he will be entitled so to hold them. The rule is well settled

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in the English courts that where a railroad company receipts property destined and directed to a point beyond the termination of their own road, they are bound to deliver it at the place of destination, without a stipulation to that effect. . . . [Such a rule is the only one consistent with the safety of the citizen and consignor, with common honesty and fair dealing, and the demands of this progressive age.]

"In this case, if you believe these goods were shipped under a special contract to be transported to Tidioute, [or with the reasonable and fair understanding by the plaintiff that the Penna. R. R. Co. was to be responsible for their delivery there, then the defendant would be and is responsible for their non-delivery, unless they have shown affirmatively and clearly how the goods were lost, and that it was without any fault or negligence on their part."]

The verdict was for the plaintiff for three hundred and nine dollars and fifteen cents. The defendants took a writ of error and assigned for error, the parts of the charge in brackets, and the affirmance of the plaintiff's first point.

J. R. Thompson, for plaintiffs in error,—Cited *Horne v. N. Y. & N. H. Railroad Co.*, 23 *Conn.* 502.

W. D. Brown (with whom was *J. A. Neill*), for defendant in error,—Cited *Britnal v. Saratoga Railroad*, 32 *Vt.* 665; *Beckman v. Shouse*, 5 *Rawle*, 189; *Am. Express Co. v. Sands*, 5 *P. F. Smith*, 140; *Hawkes v. Smith*, 1 *Car. & M.* 72; *Morse v. Brainard*, 8 *Am. L. Reg. N. S.* 604

BY THE COURT.—AGNEW, J.—In view of the evidence certified to us by the judge who tried this cause, his charge was not entirely free from error. A carrier may bind himself to transport goods beyond the ter-

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minus of his own route and thus become responsible for the default of those he employs to carry the remainder of the distance, as we decided in *Balt. & Phil. R. R. Co. v. Brown*, 4 *P. F. Smith*, 77; but the proof of the contract should be clear. Especially should this be the rule when the alleged contract would contradict the papers accompanying the transaction. The testimony of the plaintiff in this case was not clear on this point. He desired his furniture to be carried from Warren to Tidioute without transshipment, and spoke to the agent of the defendants for a special car to run through. The agent agreed to furnish the car, but denies any contract to carry the goods beyond Irvineton, the point of connection between the Philadelphia & Erie Railroad and the Oil Creek & Allegheny Valley Railroad. The plaintiff testifies that the contract was that the goods should go through to Tidioute without a change of cars, and that they should be charged a heavier rate for this advantage. The agent of the defendants explains this to be for *car* service. Now there is nothing absolutely inconsistent between this statement of plaintiff and that of Gemmil, the agent. The car might be readily furnished to go through at a higher rate for car service, and yet without a contract to carry the goods beyond Irvineton. The manifest accompanying the goods is expressly from Warren to Irvineton. The sum charged in the manifest is but eight dollars, which is proved to be the rate to Irvineton only, the residue of the freight being the charge from Irvineton to Tidioute. The release signed by Waid, who hauled the goods for the plaintiff, expressly states, "a lot of goods from Warren station to Irvineton." The copy of the receipt which Gemmil says he thinks he handed to Waid for the plaintiff when he gave the release, is express in its terms, "to be carried and delivered upon the terms and according to the agreement above specified at Irvineton station on the above railroad." Waid

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does not remember having taken the receipt, yet is not certain. Now, while the learned judge did not err in submitting to the jury the question of the contract on the plaintiff's testimony, as its purpose was to be determined by them, yet it is clear he did not present the case so as to enable them to understand the true character and effect of the evidence. In this respect his charge was insufficient and tended to mislead.

We think he erred also in charging upon the receipt given by the Oil Creek & Allegheny Valley R. R. Co., upon the transfer of the goods at Irvineton. While, as he stated, the receipt alone would be insufficient to account for the loss of the goods, yet he coupled this statement with an allegation that the evidence showed affirmatively that no examination of the goods had been made to disprove the fact of loss. This and other portions of the charge were calculated to leave the impression upon the minds of the jurors that the case was really barren of evidence tending to show when and where the goods were lost, and thus to cast the responsibility upon the defendants. But there were circumstances strongly favoring the defendants, if their contract for carriage ended at Irvineton. The goods left Warren at nine o'clock A.M. of April 3, 1868, reached Irvineton between ten and eleven o'clock of that day, and were transferred to the custody of the Oil Creek & Allegheny Valley R. R. Co., at two o'clock P.M. That all the goods were placed in the car at Warren, appears to be pretty certain. It is not probable that the articles lost were taken out in the daytime before the transfer of the car to the custody of the Oil Creek & Allegheny Valley R. R. Co. The car reached Tidioute the next day, which was Saturday, April 4. The plaintiff himself admits in his testimony that he looked into the car on Saturday to see whether the goods were dry, and then saw the box of books, dining-table and box of bedding. Now the box of books and table were

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among the missing articles on the following Wednesday. It is evident, therefore, that these goods were taken out or stolen from the car after its arrival at Tidioute, rendering it probable that the others were also taken there. The plaintiff recovered for the books and table as well as all the other articles lost. Had the question upon the contract for carriage been properly submitted to the jury and found by them to end at Irvineton, it is obvious there was ample evidence to go to the jury tending to show that the loss occurred after the goods came into the hands of the Oil Creek & Allegheny Valley R. R. Co.; yet the tendency of the charge was to impress the jury with the belief that the loss was unaccounted for and that the responsibility for them lay upon the defendants. Taking the charge as a whole it tended to mislead the jury, and this, as has been repeatedly said, is error. *Gregg v. Jamison*, 5 *P. F. Smith*, 468; *Phil. & Read R. R. Co. v. Spearem*, 11 *Wright*, 303; *Garrett v. Gonter*, 6 *Id.* 146; *Bailey v. Fairplay*, 6 *Binney*, 455, 466; *Reeves v. Del., Lack. & West. R. R. Co.*, 6 *Casey*, 454; *Harrisburg Bank v. Forster*, 8 *Watts*, 304; *Relf v. Rapp*, 3 *W. & S.* 21; *Hersheaur v. Hocker*, 9 *Watts*, 455; *Parker v. Donaldson*, 6 *W. & S.* 132; *Bovard v. Christy*, 2 *Harris*, 267; *Nieman v. Ward*, 1 *W. & S.* 68; *Keyser v. Evans*, 6 *Casey*, 507. I have collected these cases to show that the rule in recent decisions to reverse, when the effect of the whole charge is to mislead the jury, is not a novel one. It grows out of the Pennsylvania mode of bringing up the charge of the jury under the act of February 24, 1806, reinforced by the acts of April 15 and 17, 1856. It is ignorance of this mode which misleads those whose experience has never traveled out of the bill of exceptions given by the statute of 13 Edward II., ch. 31. The practice in this State, which under the act of 1806 incorporates the charge into the record itself and enables an assignment

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of error to be made to it without any bill of exceptions whatever, is so well stated by WOODWARD, Ch. J., in *Wheeler v. Winn*, 3 *P. F. Smith*, 122, no further comment is necessary. I may add, however, the following references to show the difference between the practice under the English statute and the Pennsylvania acts: *Downing v. Baldwin*, 1 *S. & R.* 298; *Brown v. Caldwell*, 10 *Id.* 114; *Bailey v. Fairplay*, 6 *Binney*, 455, 466; *Reigart v. Ellmaker*, 14 *S. & R.* 121; *Munderbach v. Lutz*, 14 *Id.* 125. Under the act of 1806, the evidence comes up under the certificate of the judge, the counsel being bound to make it up and present it for signature, the judge deciding what the evidence was when the counsel differ as to it. Thus the whole case is really before this court in the evidence and charge (as in the present instance), and the effect of the charge brought into view; and when it clearly tends to mislead by drawing the minds of the jury away from the true point of the inquiry, or by putting aside a material aspect of the case, judicial notice will be taken of it. A charge which misleads differs from a mere omission to instruct. 6 *Wright*, 146; 6 *Casey*, 480. Justice demands this, and that it is the true purpose of every trial to reach.

Judgment reversed, and a *venire facias de novo* awarded.

PROCTOR v. EASTERN RAILROAD COMPANY.

105 *Massachusetts*, 512.

Railroad. Common carrier. Freight charges. A railroad company receiving goods consigned to a place off its line, and agreeing to forward them by a particular line from its terminus to their desti-

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nation, will be liable to the consignor for the increased freight charges, if it forwards them by another and more expensive line.

The declaration in this action alleged that the plaintiff delivered to the defendant, which was a common carrier for hire, two hundred and seventy-two kits of mackerel, at Gloucester, July 16, 1866, to be transported over its road to Boston, and there by the defendant delivered for plaintiffs to the Merchants' Express, and forwarded by the line of said Merchants' Express to St. Louis, and that through the negligence of the defendant the goods were miscarried and lost to plaintiff.

The declaration also contained a count in tort for the conversion of the property.

The answer of defendant admitted that it was the owner of the railroad; that it was a common carrier for hire between Gloucester and Boston, and that the mackerel were received by it to be transported to Boston, and then delivered to the Merchants' Express line. But it denied that they undertook further to provide for their disposition, or to perform any other duty in respect to them. It also alleged that it delivered them, and performed all its agreements in the matter.

On the trial, in the superior court, the plaintiff proved that the goods were delivered, on the day alleged, to the defendant's agent, at Gloucester, to be forwarded to the Merchants' Express, at Boston, for transportation to St. Louis, and that he received from the agent a receipt as follows:

"EASTERN RAILROAD, GLOUCESTER BRANCH, }
"GLOUCESTER, July 16. 1866. }

"Received, of Joseph O. Proctor, 272 kits mackerel.
Marks and numbers, P. G. & Co., St. Louis, Mo.,
Merchants' Express."

That William J. C. Kenney, general freight agent

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of defendant's company, admitted to the plaintiff that he had made a mistake in forwarding the goods, and that he did not know that there was such a line from Boston as the Merchants' Express; that the goods were forwarded from Boston to New York by the Old Colony and Newport Railway Company, and that the freight agent of the latter company procured of its forwarding agents in New York the following receipt, which he delivered to the defendant :

"MERCHANTS' EXPRESS AND TRANSPORTATION }
 "COMPANY, EXPRESS FORWARDERS, }
 "NEW YORK, July 19, 1866. }

"Received, of Mangam & Tiers, 272 kits; value not given; marked P. G. & Co., St. Louis, Mo. Back charges, \$26.82. Freight, \$5.50 per 100 lbs.

"For the company. WESCOTT."

The plaintiff also proved that after the goods arrived at St. Louis he went with Kenney, the defendant's agent, at his request, to the office of the Adams' Express Company, in Boston, to see if some reduction in the charges for the transportation of these goods from New York to St. Louis could not be obtained, on account of the mistake which had been made in forwarding them. That the freight charges of the Old Colony Railway Company on the goods were ten cents per kit, and the charges of the forwarders from New York five dollars and fifty cents per hundredweight.

Evidence was also introduced showing that the Merchants' Express was a transportation line, over several connecting roads from various points in the east to those in the west, formed by arrangement of the companies owning the several roads; that the Old Colony and Newport Railway did not form a part of this line; that the several companies joining in said arrangement had an office and representatives in Boston to receive and give proper vouchers for goods to be forwarded by Merchants' Express, in July, 1866, when the goods

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arrived at Boston, and that the freight charges by said line from New York to St. Louis, at that time, would have been ninety-two and a half cents per hundred-weight on said goods.

Plaintiff also showed that he demanded of Kenney the difference between the charges made and the tariff of the Merchants' Express, and offered on its payment to receive the goods at St. Louis and pay the freight bill as charged.

The defendant offered to show that the end of their route was in Boston; that all their inward bound freight was received at the freight depot in East Boston, and that they did not cart any freight from this depot; that on receipt of these goods, Kenney, who had never heard of the Merchants' Express line from Boston, made inquiries in respect to it, and, getting no information of its existence, forwarded them to New York, as shown, and thence to St. Louis.

The court ruled that these facts, if proven, constituted no defense to the action, excluded all evidence in respect to them, and instructed the jury that the plaintiff was entitled to recover for the difference between the freight charge at ninety-two and a half and five dollars and fifty cents per hundredweight, with interest. The verdict was returned in accordance with these instructions.

S. Lincoln, Jr., and S. B. Ives, Jr., for the defendants

B. H. Smith, for the plaintiff.

MORTON, J.—The defendants agreed to convey the merchandise of the plaintiff over their road to Boston, and there deliver it to the Merchants' Express, a line of transportation from Boston to the West. They admit this in their answer. By their contract, they were to

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act as common carriers and forwarding agents. *Darling v. Boston & Worcester Railroad Co.*, 11 *Allen*, 295. Instead of delivering the merchandise to the Merchants' Express, they delivered it to the Old Colony and Newport Railway Company, by which it was transported to New York, and thence by other carriers to its place of destination, at a cost to the plaintiff much greater than the expense of its transportation would have been if it had been forwarded by the Merchants' Express. The mere statement of the case shows that the defendants failed to perform their contract, to the damage of the plaintiff; and it is clear that the plaintiff is entitled to recover the damages sustained by him by reason of such breach.

The facts that Mr. Kenney, an agent of the defendants, had never heard of the Merchants' Express line from Boston, and that he made inquiries of several persons and did not learn of the existence of this line, furnish no justification to the defendants; and evidence thereof was properly excluded by the court.

Judgment on the verdict for the plaintiff.

AUDENRIED v. PHILADELPHIA & READING
RAILROAD COMPANY.

68 *Pennsylvania*, 370.

Injunction. The object of a preliminary injunction is simply preventive, to maintain things as they are until the rights of the parties can be considered and determined after a full hearing.

Preliminary injunction is never awarded except when the equity of the complainant is clear, supposing the facts of which he gives *prima facie* evidence to be ultimately established.

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illegal and oppressive, and would tend to the great and irreparable injury of the plaintiffs, and forever put shippers under the control of the managers of the road, and the refusal of these wharf facilities is practically a refusal to allow the plaintiffs to carry on their business for shipping coal over the Philadelphia & Reading Railroad, intended for shipment at Port Richmond.

"27. They further charge, that the company insists :

"1. They are the absolute owners of the said wharves and can exercise their rights regardless of motive.

"But the plaintiffs charge that having so constructed their road that these wharves are essential to the shipping trade over the road, the said wharves being at the terminus of the road, which is the Delaware river, are also part of the road and subject to the same rules as the residue of the road, so far as concerns shippers over said road intending to ship into vessels at the terminus, and the company cannot so use their rights as to affect injuriously the rights of some persons using the road, but which do not affect others similarly circumstanced, but must allow such a use of the wharves as will enable all shippers practically to use the road as it is held out to the public it is intended to be used.

"2. That there is not room for all, and that they are entitled to discriminate.

"But the plaintiffs charge that they cannot discriminate between persons similarly circumstanced, and that your orators are prepared, and have always been, to furnish as much coal, and on the same terms, as the most favored of those who have the use of the wharves. And they further charge that the real motive of the company was to coerce the plaintiffs, and this was distinctly threatened in a letter from the president of the company, dated February 1, 1870, and that under

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no circumstances can such a right be exercised from such motives.

"3. That they have allotted all the wharves, and there is no room left.

"The plaintiffs charge the contrary to be the truth, and that no pretense of allotment of the wharf hitherto occupied by them, was made until March 15, about a month after the allotment was made of the wharves generally for the trade, and that the company have it in their power, if compelled or willing, to find abundant wharf room for your orators' accommodation. And further, that the allotment of this wharf was made for the very purpose of barring this application, and the threatened redress of the plaintiffs' wrongs, and that the company should not be permitted to continue to allow such use as will hinder the plaintiffs from their share, even though it may be compelled to compensate persons to whom they may have made these allotments. And that it is but aggravation of the wrong to pretend to use the franchises granted them in the manner best calculated to serve the public, while in truth this is done as an act of vengeance, or to coerce submission to demands which should be the subject of suits.

"4. They pretend that the conduct of the plaintiffs justifies them in this refusal of accommodations.

"But the plaintiffs charge that defendants, as carriers, cannot refuse to give them equal facilities with others similarly circumstanced as they are, because of a refusal by them to pay money obtained by them from the defendants, even if obtained by fraud, much less if there be a doubt or question as to the right of the company. Such a pretense, once admitted, would enable the company, or any other transporting company, to compel payment of any demand at the peril of the destruction of the trade of the alleged debtor carried on over the road. And more especially is this

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so when the demand is not for anything connected with the trade that is asked to be carried on, but because of past transactions, and those not connected with the regulations of the wharves or shipments, but for what is at most a payment by mistake of a bonus on coal previously carried and sold."

The prayers were :

I. That the court will declare and establish the rights of the plaintiffs to so much or such a portion of wharf room and shipping facilities in every particular, as will put them on an equality in all respects as to conveniences for receiving, storing and shipping coal at Richmond, with any other shipper in proportion to the business done by them and such other shippers.

II. That the defendants be restrained from refusing to allow or continue to the plaintiffs such facilities as aforesaid, as are required for the purposes aforesaid.

III. That the defendants be restrained from allowing any other person or persons to use any part or parts of the said wharves for receiving and storing coal preparatory to the shipping of the same, while, and so long as the defendants omit to furnish the plaintiffs with similar facilities, in a due portion as compared with those enjoyed by such other persons furnishing similar quantities of coal to the railroad company for shipment at that place and under the same regulations.

IV. And that the defendants be restrained from hindering or otherwise obstructing the plaintiffs in conducting their business on this road and wharves in the same manner and with equal facility as any other person or persons using the said road.

V. General relief.

The bill was accompanied by the affidavits of Addison Child, Lewis Audenried and W. G. Audenried, three of the plaintiffs, deposing that the averments in the bill were true, and also deposing as to parts in detail.

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C. H. T. Collis, Esq. was appointed examiner to take depositions of witnesses to be read on hearing the motion for a preliminary injunction.

Much testimony was taken upon the allegations in the bill and with reference to the allotments of the wharf facilities theretofore used by the plaintiffs.

April 29, 1870, at Nisi Prius, Mr. Justice READ made this decree: "It is ordered that an injunction do issue, as prayed in the second, third and fourth clauses of the prayers of the bill filed in this cause, enjoining and restraining the defendants as therein prayed, until the further order of this court, upon the plaintiffs giving bond, &c."

The defendants appealed to the court in banc and assigned the decree for error.

J. E. Gowen and Meredith, for appellants.—1. The delay in filing the bill is a sufficient answer to the prayer for a preliminary injunction. *Hill. on Injunctions*, p. 24, § 53; *Tush v Adams*, 10 *Cush.* 253; *Binney's Case*, 2 *Bland*, 99; *Hodges on R.* 759; *Illingworth v. Manchester and Leeds R. W. Co.*, 2 *Railway Cases*, 187.

2. The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it was when the order was made. *Farmers' Railroad Company v. Reno, &c., Co.*, 3 *P. F. Smith*, 224; *Mam. Vein C. C. Co.'s Appeal*, 4 *Id.* 183.

3. The plaintiffs have no more right to the exclusive use of one of the defendants' coal piers for storing and shipping their coal, than they have to the use of one of defendants' coal-yards or ordinary warehouses.

4. Even in the case of an ordinary railroad yard at a station or depot, the railroad company is not bound to admit every one who proposes to carry on the business of receiving and delivering freight there, much less to appropriate to him the exclusive use of yard-

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room or depot-room for the more convenient transaction of his business. *Barker v. Midland Railway Co.*, 10 *Com. Bench*, 46; *Beadell v. Eastern Co.'s Railway Co.*, 2 *Com. B. N. S.* 509; *Painter v. L. B. & S. R. W.*, 2 *Id.* 702; *Marriot's Case*, 1 *Id.* 498; *S. C.* 49 *Eng. Law & Eq.* 250.

5. Where the facilities of a railroad company are inadequate to accommodate all applicants, no one can insist upon a special and absolute right in himself, nor must the company refuse to accommodate any, because they cannot accommodate all; and in making a selection, the company has the right to exclude those who abused the facilities in question when they enjoyed them to its injury and discredit. *Oxlade v. North Eastern Railway*, 1 *Com. Bench N. S.* 454; 2 *Redf. on R.* 69, § 4; *Id.*, p. 217; *Angell on Carr.* § 125, and note 1; § 524 and following. *Chitty on Carr.* p. *247; *Riley v. Horne*, 5 *Bing.* 217; *Cole v. Godwin*, 19 *Wend.* 261; *Jencks v. Coleman*, 2 *Sumner*, 221; *Palmer v. London and South Western Railway*, 1 *L. Rep. C. P.* 588; *Ronsome v. E. Counties Railway*, 38 *Eng. L. & Eq.* 232; *S. C.*, 1 *C. B. N. S.* 437; *Nicholson v. Gt. Wn. Railway*, 5 *C. B. N. S.* 366; 2 *Redf. on R.* 218.

R. C. McMurtrie and *G. W. Biddle*, for appellees.—1. The railroad company as a common carrier cannot directly or indirectly use their franchises so as practically to exclude one man from an advantage which others are allowed to enjoy.

2. That the railway tracks running over and upon the wharves are thus a connecting link between the road and the water highway, and are subject to the same rules as the road.

3. The avowed motive is no justification. A carrier has a lien for his freight, but he has none for an old debt. If he cannot refuse to deliver on tender of freight

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due on that cargo, *a fortiori* can he not refuse to transport till the old debt is paid.

4. The road and the wharves, though property of the company, are qualified property. The public have an interest. The right to build a road and hold property was granted for the public service, and can only be used lawfully.

5. Where a corporation refuses the use of its property to a particular member of the public, they must justify for special reasons applicable to that person, or that occasion; and whether this was the motive, or whether their conduct was founded on sufficient reasons, is traversable. *Dummer v. Corporation of Chippenham*, 14 *Ves.* 252; *Hill on Trustees*, 488; 1 *Chitty Pl.* 612-14.

6. Where they owe a duty they will be compelled to perform it; if they have entangled themselves with inconsistent engagements they will be prohibited from acting in such way as will disable them from performing the duty. *Kerr on Inj.* 250; *Commonwealth v. Pittsburg & Connellsville Railroad*, 12 *Harris*, 159; *Sanford v. Catawissa Railroad*, *Id.* 380; *Baptist Congregation v. Scammel*, 3 *Grant*, 48; *People v. Vanderbilt*, 26 *N. Y.* 287; *Niagara v. Great Western Railroad*, 39 *Barb.* 212; *Baltimore v. Porter*, 18 *Maryland*, 284.

7. If the fact that they have made contracts which deprive them of capacity serves as an excuse against fulfilling an obligation, there will never be another case of compelling a railway to perform.

8. They say they have not sufficient wharves for all, and hence they must discriminate. But if this discrimination is not for the benefit of the road, but a mere stalking-horse to cover and conceal the real motive, and that is an unlawful one, then the court will examine and redress.

9. And if they are compelled to select and discrimi-

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nate, then they must do it by dividing, not by excluding.

BY THE COURT.—SHARSWOOD, J.—There are two kinds of injunctions in courts of equity. The one is preliminary or interlocutory; the other final or perpetual. The object of the first in general is simply preventive—to maintain things in the condition in which they are at the time until the rights and equities of the parties can be considered and determined after a full examination and hearing. A preliminary injunction is never awarded, except when the rights or equity of the plaintiff are clear, at least supposing the facts of which he gives *prima facie* evidence to be ultimately established.

All injunctions are generally processes of mere restraint; yet final injunctions may certainly go beyond this and command acts to be done or undone. They are then termed mandatory. They are often necessary to do complete justice. But the authorities, both in England and this country, are very clear that an interlocutory or preliminary injunction cannot be mandatory. In *Gale v. Abbott*, 8 *Jurist N. S.* 987, Vice-Chancellor KINDERSLEY said: "It was useless to come for what was called a mandatory injunction on an interlocutory application. Such an application was one of the rarest cases that occurred, for the court would not compel a man to do so serious a thing as to undo what he had done, except at the hearing." So in *Child v. Douglass*, *Kay*, 578, Vice-Chancellor Sir W. PAGE WOOD, now Lord' Chancellor HATHERLEY, noticed the same distinction: "The plaintiff has a right to an injunction to restrain the building of the wall until further order; but I can make no order on an interlocutory application as to that part of the motion which relates to pulling down what has already been built."

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It was said by Chancellor BLAND, in *Murdoch's Case*, 2 *Bland*, 469: "To restrain a defendant from making any abusive use of the property in question, or from disposing of it past recall, amounts to no more than the imposition of a temporary limitation upon the free exercise of his right, even if it should eventually appear to be entirely and rightfully his;" which is quite as far as any court can go in the first instance, and as preparatory to a fair beneficial hearing and final adjudication.

It was held accordingly in *Washington University v. Green*, 1 *Md. Ch.* 97, that an injunction, unless issued after the final decree, when it becomes a judicial process, can only be used for the purpose of prevention and protection, and not for the purpose of commanding the defendant to undo anything which he had previously done. To the same effect are *New York Printing and Dyeing Establishment v. Fitch*, 1 *Paige*, 97; *Bosley v. Susquehanna Canal*, 3 *Bland*, 65; *Attorney-General v. New Jersey R. R. Co.*, 2 *H. W. Green Ch.* 136; *Attorney-General v. City of Patterson*, 1 *Stockt.* 624. This distinction between a preliminary and final injunction is fully recognised in our own decisions.

Mr. Justice STRONG states it in his opinion *at nisi prius*, in *Lehigh Coal and Navigation Co. v. Lehigh Valley R. R. Co.*, January, 1855, No. 59, April 5, 1855, in which he says: "A preliminary injunction ought never to be granted except in a clear case, and then only to prevent a substantial injury. Its purpose is to keep things in their existing condition until the case can be finally heard. As it is the strong arm of the law, it must be used only when necessity requires it. And a preliminary injunction can never be necessary when the thing sought to be restrained has been already done; for its province is not to undo but to prevent and preserve."

The same learned judge, delivering the opinion of

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the whole court in *Farmers' R. R. Co. v. Reno, &c. Co.*, 3 *P. F. Smith*, 224, said: "The sole object of such an order is to preserve the subject of the controversy in the condition in which it is when the order is made. It cannot be used to take property out of the possession of one party and put it into the possession of the other; that can be accomplished only by a final decree."

To the same point is *Mammoth Vein Coal Company's Appeal*, 4 *P. F. Smith*, 183, in which the present Chief Justice said: "It ought not to be forgotten that a preliminary injunction is a restrictive or prohibitory process, designed to compel the party against whom it is granted to maintain his status merely until the matters in dispute shall by due process of the courts be determined." It is true that a mandatory order appears to have been made by Mr. Justice LOWRIE, on a motion for a preliminary injunction before him in Allegheny county, in *Baptist Congregation v. Scannell*, 3 *Grant*, 48. It is enough to say of that case now, that the question does not appear to have been mooted or argued; at all events it is not adverted to in the opinion.

There are some few instances in England in which a mandatory order has been made on an interlocutory application; but they have been very extreme cases, and ought not to be followed as precedents. Thus in *Attorney-General v. Metropolitan Board*, 1 *Hem. & M.* 321, where the flue of a chimney had been stopped up by a plate put over it, so as to fill the house with smoke, the order was made so as to compel the defendant to remove it. In *Hepburn v. Lardner*, 2 *Id.* 345, damp jute was stored and dried on premises adjoining the plaintiff's premises, at the imminent risk of combustion.

These and perhaps a few other cases of similar character rest on the authority of *Lane v. Newdgate*, 10

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Ves. 193, in which Lord ELDON, in what he considered a clear and hard case, evidently felt that he was treading on dangerous ground, and therefore resorted to indirection to accomplish his purpose. The plaintiff was the assignee of a lease of mill property granted by the defendant, with covenants for the supply of water from canals and reservoirs on defendant's premises.

The allegation was that he had suffered the canal and reservoir to be out of repair, and especially had removed a certain stop-gate. Lord ELDON expressed a difficulty whether it was according to the practice of the court to decree or order repairs to be done, but afterwards said: "So as to restoring the stop-gate the same difficulty occurs. The question is, whether the court can specifically order that to be restored. I think I can direct it in terms which will have that effect. The injunction I shall order will create the necessity of restoring the stop-gate, and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works."

That is acknowledging that he could not, according to the principles and practice of the court, order the defendant in direct terms to restore the stop-gate and repair the works: the injunction should be so drawn that, although on its face restrictive only, it will, in order to comply with it, compel him to do these very things. This is not a precedent which ought to be followed in this or any other court. A tribunal that finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indirection. Injunction as a measure of mere temporary restraint is a mighty power to be wielded by one man. It would extend far beyond all safe and reasonable bounds to permit it to go farther.

The reason of the distinction in this respect between an interlocutory and final injunction is very obvious.

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The former may be granted on an *ex parte* application ; even when it is upon notice it is upon *ex parte* affidavits. The mode in which the testimony was taken in this case by an examiner was very unusual ; but it cannot change the character of the application. The proceedings, in the nature of things, must be summary. Besides, the effects of an interlocutory injunction may often be the same as a final decree, as, indeed, in this very instance.

The decree appealed from in this case was clearly mandatory. It followed closely *Lane v. Newdigate*, if it did not go beyond it. It commanded the defendants to allot, allow or continue to the plaintiffs such use of a wharf or wharves as are required by them, which shall be equal in quantity and convenience to the wharf accommodations furnished to any other person ; and that defendants refrain from allowing any other person to use any part of the wharves while they omit to furnish the plaintiffs with similar wharf facilities in a due proportion. We must take this decree, in connection with the undisputed fact that before the bill was filed the defendants had allotted all their wharves to others ; and it is very plain that they could not obey this decree without revoking this allotment and making a new one.

It is very true that it did not appear that any possession had been taken under the allotment at the time the bill was filed. It was upon paper merely. But that ought not to weigh in this case, because the several allottees under the allotment thus made were not made parties to the suit and have not been heard. Had they taken possession under their allotments it is not very easy to see how they could have been proceeded against for contempt. Their equities may be as strong as the plaintiffs. Beginners and small dealers have their rights as well as old and large ones. What contracts or arrangements for their business upon the faith of the

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allotment to them they had made we do not know. They were at least entitled to be heard.

Apart, however, from these considerations, we do not think that the facts disclosed by the depositions show so clear an equity in the plaintiffs as would have entitled them to a restrictive injunction had they filed their bill before the allotment was made. It is not necessary to go further than this to prove that the preliminary injunction ought not to have been awarded. It is very doubtful whether the defendants, under their charter, are bound to provide any wharf accommodations for the coal dealers at Port Richmond, and equally doubtful whether, having done so to a limited extent, not sufficient to supply the entire business, they are subject to any trust to use or dispose of that property in any particular way.

But concede both these points, what then? As trustees there is a discretion reposed in them in the use of the property with which a chancellor cannot interfere. It is agreed that they have not room enough for all. They must select some and reject others. Can a chancellor inquire into their motives, and not approving of them, assume the selection himself? The case of *Dummer v. Corporation of Chippenham*, 14 *Ves.* 245, upon which the plaintiffs principally rely, does not support their assertion.

There the trustees of a charity school threatened to remove the master because he had voted contrary to their wishes in the election of a member of parliament. The question was: had the chancellor jurisdiction to inquire into the matter and enjoin against such removal? It was upon demurrer to the bill. Had the master held his appointment for a term certain, which had expired or was about to expire, and the prayer had been to enjoin his reappointment, it would have had some analogy to this case.

Can any one suppose that such a jurisdiction would

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have been assumed? It is not a matter which is open to dispute upon the depositions that the allotment of wharves by the defendants was annual—that the allotment made to the plaintiffs in 1869 had expired, and that there was no agreement to renew it. Changes appear to have been frequently made, although, as was natural, the allotments were generally renewed. It is agreed that the company might have put up these privileges every year and sold them to the highest bidder, as is somewhat done with the pews or seats in churches. They preferred to distribute them without premium or rent, in order that they might retain a more absolute control over the property.

It may well be, however, notwithstanding this, that an allottee turned out by the defendants, capriciously or from improper motives, during the year for which the allotment was made, might, on equitable grounds, be restored to the privilege for the rest of the year, or by an interlocutory injunction his removal, if threatened, prevented. But what right or equity has such an occupier, superior to others, to hold over for another year? That would be to assure him a perpetual lease. If such a perpetual lease had been granted to one coal dealer exclusively in all the wharves, it might well be argued that *Sandford v. Railroad Company*, 11 *Harr.* 378, would go far to sustain the position that such a grant was *extra vires*.

That case has no bearing upon this. Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to one is inconsistent with the rights of all others. This was not transportation, but wharfage, the nature of which requires exclusive possession temporarily. The railroad company as trustees for the public have a necessary discretion in the management of such interests, and the motives of their proceedings cannot be reviewed by the courts.

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It would be a dangerous and alarming power to be exercised by a chancellor over corporations or other trustees, to direct the appointment to offices, or awarding of contracts, whenever it appeared that it was about to be used for political or other improper motives. This would be in effect to deprive the directors of corporations of their management, and to substitute the chancellor as a supreme director or manager. For this reason we think the decree in this case ought not stand.

Decree reversed and record remitted.

CHICAGO & NORTHWESTERN RAILWAY
COMPANY v. WILLIAMS.

55 Illinois, 186.

Railroads. *Power to make rules in respect to passengers.* Whatever rules tend to the comfort, order and safety of the passengers on a railroad, the company are authorized to make and to enforce. But such rules must always be reasonable, and uniform in respect to persons.

Same. *Setting apart a car for ladies.* A rule setting apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable rule, and it may be enforced.

Same. *Exclusion of colored persons.* The mere fact that, under the rules and regulations of the company, a certain car in their passenger train has been designated for the exclusive use of ladies, and gentlemen accompanied by ladies, will not justify the exclusion of a colored woman from the privileges of such car, upon no other ground than that of her color.

Under some circumstances, it might not be an unreasonable rule to require colored persons to occupy separate seats in a car furnished

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by the company, equally as comfortable and safe as those furnished for other passengers. But in the absence of any reasonable rule on the subject, the company can not lawfully, from caprice, wantonness or prejudice, exclude a colored woman from the ladies' car, merely on account of her color.

Of excessive damages. *In such case. Measure of damages.* Where a person seeking passage in a particular car in a railroad train is wrongfully and wantonly excluded therefrom, he may recover, in addition to the actual damages, something for the indignity, vexation and disgrace to which he was subjected by reason thereof.

So where a colored woman was refused admittance to a ladies' car, solely on account of her color, and was directed to take a seat in another car, which was set apart for, and mostly occupied by men, but which she declined to do, insisting upon her right to be admitted to the ladies' car, and the evidence justifying the conclusion that the brakeman, in excluding her from that car, did so in a very rude manner, and in the presence of several persons, it was *Held*, a verdict of two hundred dollars recovered by the woman against the company, was not excessive.

Appeal from the circuit court of Winnebago county ;
the Hon. BENJAMIN R. SHELDON, Judge, presiding.

This was an action on the case, brought in the court below by Anna Williams, a colored woman, against the Chicago and Northwestern Railway Company, to recover damages resulting to the plaintiff by reason of being excluded from the privileges of a car upon the defendants' road, which had been designated, under the rules of the company, for the exclusive use of ladies, and gentlemen accompanied by ladies, the only reason for such exclusion of the plaintiff being on account of her color.

Upon the trial, the plaintiff recovered a judgment for two hundred dollars, from which the company appealed.

Mr. James M. Wright, for the appellants.

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Mr. E. W. Blaisdell, Jr., and Mr. C. F. Miller,
for the appellee.

BY THE COURT.—SCOTT, J.—There is but one question of any considerable importance presented by the record in this case.

It is simply, whether a railroad company, which, by our statute, and the common law, is a common carrier of passengers, in a case where the company, by their rules and regulations, have designated a certain car in their passenger train for the exclusive use of ladies, and gentlemen accompanied by ladies, can exclude from the privileges of such car a colored woman, holding a first-class ticket, for no other reason except her color.

The evidence in the case establishes these facts—that, as was the custom on appellants' road, they had set apart in their passenger trains a car for the exclusive use of ladies, and gentlemen accompanied by ladies, and that such a car, called the "ladies' car," was attached to the train in question. The appellee resided at Rockford, and being desirous of going from that station to Belvidere, on the road of appellants, for that purpose purchased of the agent of the appellants a ticket, which entitled the holder to a seat in a first class car on their road. On the arrival of the train at the Rockford station, the appellee offered and endeavored to enter the ladies' car, but was refused permission to do so, and was directed to go forward to the car set apart for and occupied mostly by men. On the appellee persisting on entering the ladies' car, force enough was used by the brakeman to prevent her. At the time she attempted to take a seat in that car, on appellants' train, there were vacant and unoccupied seats in it, for one of the female witnesses states that she, with two other ladies, a few moments afterwards, entered the same car at that station, and found two

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vacant seats, and occupied the same. No objection whatever was made, nor is it insisted any other existed, to appellee taking a seat in the ladies' car, except her color. The appellee was clad in plain and decent apparel, and it is not suggested, in the evidence or otherwise, that she was not a woman of good character and proper behavior.

It does not appear that the company had ever set apart a car for the exclusive use, or provided any separate seats for the use of colored persons who might desire to pass over their line of road. The evidence discloses that colored women sometimes rode in the ladies' car, and sometimes in the other car, and there was, in fact, no rule or regulation of the company in regard to colored passengers.

The case turns somewhat on what are reasonable rules, and the power of railroad companies to establish and enforce them.

It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of the passengers traveling on their lines of road. It is not only their right, but it is their duty to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers.

It was held, in the case of the Ill. Cent. R. R. Co. v. Whittemore, 43 Ill. 423, that, for a non-compliance with a reasonable rule of the company, a party might be expelled from a train at a point other than a regular station.

If a person on a train becomes disorderly, profane or dangerous and offensive in his conduct, it is the duty of the conductor to expel such guilty party, or at

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least to assign him to a car where he will not endanger or annoy the other passengers. Whatever rules tend to the comfort, order and safety of the passengers, the company are fully authorized to make, and are amply empowered to enforce compliance therewith.

But such rules and regulations must always be reasonable, and uniform in respect to persons.

A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made, must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of law, and is for the court to determine, under all the circumstances, in each particular case.

In the present instance, the rule that set apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable one, and the power of the company to establish it has never been doubted.

If the appellee is to be denied the privilege of the "ladies' car," for which she was willing to pay, and had paid, full compensation to the company, a privilege which is accorded alike to all women, whether they are rich or poor, it must be on some principle or under some rule of the company that the law would recognize as reasonable and just. If she was denied that privilege by the mere caprice of the brakeman and conductor, and under no reasonable rule of the company, or, what is still worse, as the evidence would indicate, through mere wantonness on the part of the brakeman, then it was unreasonable, and therefore unlawful. It is not pretended that there was any rule that excluded her, or that the managing officers of the company had ever given any directions to exclude colored persons from that car. If, however, there was such a rule, it could not be justified on the ground of

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mere prejudice. Such a rule must have for its foundation a better and a sounder reason, and one more in consonance with the enlightened judgment of reasonable men. An unreasonable rule, that affects the convenience and comfort of passengers, is unlawful, simply because it is unreasonable. *State v. Overton*, 4 *Zab.* 435.

In the case of *West Chester & Philadelphia R. R. Co. v. Miles*, 55 *Penn.* 209, it was admitted, that no one could be excluded from a carriage by a public carrier on account of color, religious belief, political relations or prejudice, but it was held, not to be an unreasonable regulation to seat passengers so as to preserve order and decorum, and prevent contacts and collisions arising from well known repugnances, and therefore a rule that required a colored woman to occupy a separate seat in a car furnished by the company, equally as comfortable and safe as that furnished for other passengers, was not an unreasonable rule.

Under some circumstances, this might not be an unreasonable rule.

At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other travelers, must be held to have no right to discriminate between passengers on account of color, race or nativity, alone.

We do not understand that the appellee was bound to go forward to the car set apart for and occupied mostly by men, when she was directed by the brakeman. It is a sufficient answer to say that that car was not provided by any rule of the company for the use of women, and that another one was. This fact was known to the appellee at the time. She may have undertaken the journey alone, in view of that very fact, as women often do.

The above views dispose of all the objections taken to the instructions given by the court on behalf of the

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appellee, and the refusal of the court to give those asked on the part of the appellants, except the one which tells the jury that they may give damages above the actual damages sustained, for the delay, vexation and indignity to which the appellee was exposed, if she was wrongfully excluded from the car. If the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensation at all, above nominal damages, and no salutary effect would be produced on the wrongdoer by the verdict. But we apprehend, that if the act is wrongfully and wantonly committed, the party may recover, in addition to the actual damages, something for the indignity, vexation and disgrace to which the party has been subjected.

It is insisted that the damages are excessive, in view of the slight injury sustained.

There is evidence from which the jury could find that the brakeman treated the appellee very rudely, and placed his hand on her and pushed her away from the car. The act was committed in a public place, and whatever disgrace was inflicted on her was in the presence of strangers and friends. The act was, in itself, wrongful, and without the shadow of a reasonable excuse, and the damages are not too high. The jury saw the witnesses, and heard their testimony, and with their finding we are fully satisfied. Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

SHELDON, J.—Having heard this cause in the court below, took no part in this decision.

BREESE, J.—I am not prepared to assent to all the reasoning and conclusions of the above opinion, and I am further of opinion the damages are excessive.

Jackson v. Second Ave. R. R. Co.

JACKSON v. SECOND AVENUE RAILROAD
COMPANY.

47 New York, 274.

Street Railroad. Expulsion of Passengers. The conductor on a street car was instructed by the company to collect a certain fare for each passenger, and to remove any one refusing to pay the fare. *Held*, if the company has no right to collect the fare, it is liable for any degree of force employed to remove a passenger. If it has a right to collect the fare it is nevertheless liable if the conductor, in removing the passenger, exceeds the degree of force necessary and proper for the purpose, and any injury results.

Malice. The question whether the act from which the injury followed was animated by malice or a misconception of the necessary force to be used, is for the jury.

Appeal from order of the general term of the supreme court in the first judicial department.

The respondent, Jackson, brought suit against the defendant company and John Doe, by which title in their complaint they intended to describe a conductor on the company's line, for assault and battery.

The facts shown are as follows: The plaintiff got into one of the company's street cars at Peck-slip, intending to ride as far as Fifty-ninth street. The fare to Forty-second street was five cents, and above there ten cents, by charter of the company. Five cents fare was tendered by plaintiff to the conductor, who demanded six, and, on being asked to explain, said the fare had been raised, and called plaintiff's attention to placards posted in the car. Plaintiff maintained that five cents was legal fare, and that he would pay no more. The conductor caught him around the waist, stopped the car, and attempted to eject him. Plaintiff resisted, re-

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fusing either to pay the other cent or leave the car, and seized hold of the handle of the door to prevent being put off. The conductor then struck him one blow on the nose, which abraded the skin and caused it to bleed.

Nothing more was done, and plaintiff rode to Fifty-ninth street, where he got out.

On motion of the defendant company's counsel, after completion of the case of the plaintiff on the trial at the circuit, the complaint was dismissed, on ground that the principal is not liable for tort committed by a servant, except it be done by authority, or occurs in the immediate discharge of the servant's duty.

The judgment entered upon this decision was reversed and new trial granted.

Samuel Hand, for appellant.—The principal is not liable for the tort of a servant in matters beyond the scope of his duty, unless authorized or adopted. *Story's Ag.*, § 456; *Middleton v. Fowler*, *Salk.* 282; *McManus v. Crickett*, 1 *East*, 106. A railroad company is only liable in case the conductor, in discharging his duty, does it negligently and injury results. *Weed v. P. R. R. Co.*, 17 *N. Y.* 362; *Sanford v. Eighth Ave. R. R.*, 23 *Id.* 343; *Myer v. Second Ave. R. R.*, 8 *Bois.* 305; *Hibbard v. N. Y. & E. R. R. Co.*, 15 *N. Y.* 155.

H. Morrison, for respondent.—If the act is willful, the defendant is liable by statute (*Laws of 1824*, p. 347, § 1; 2 *R. S.* 165, § 7, 4 ed.); as well as by rules of common law. *Higgins v. Watervliet Turnpike & R. R. Co.*, *Court of Appeals*, not reported; *Weed v. Panama R. R. Co.*, 17 *N. Y.* 363; *Sanford v. Eighth Ave. R. R. Co.*, 23 *Id.* 343.

FOLGER, J.—If it be assumed, as I think that it may

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be, that the defendants' conductor had been instructed by them to demand of every passenger six cents as fare, and that he was also instructed and authorized by them to remove from the car any passenger who refused to pay that sum, then in this case the conductor was acting in the line of his duty to them, and of his authority from them, in attempting to remove the plaintiff from the car. The six cents fare had been demanded of the plaintiff; he had refused to pay it; he had been told that he would be removed unless he paid it, and he still refused. The conductor then seized him, and attempted his removal, and while thus engaged struck the blow more particularly complained of. It cannot be doubted but that the defendants are so far responsible for the act of the conductor their agent that if they had not the right to demand the six cents fare, and hence had not the right to remove any passenger from their car for not paying that sum, they would have been liable for any force used by their agent upon the person of such passenger, though confined strictly within a degree necessary to effect such removal, and used solely for that purpose and with that intent. See *Ramsden v. B. & A. R. R. Co.*, 104 *Mass.* 117. And for the reason that he was in their business, using a physical force upon another which he had no right to exert, and which they had no right to instruct and authorize him to exert, and any force was an excess of right, does it not follow, that where they have the right to instruct and authorize to the use of force, and their agent acting in the pursuit of his duty to them, and under authority which they have given, exceeds, through zeal or impetuosity of temper, the degree of force necessary and proper to accomplish the purpose, and injury and damage ensue, that they must respond? So we have held in *Higgins v. Water-vliet T. & R. Co.*, 46 *N. Y.* 23. But it is said that the act of the conductor in striking the plaintiff a blow in

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his face was willful and malicious ; that it was not done by him because he mistakenly conceived it a necessary use of force to effect the removal of the plaintiff, but as a wanton act of rage and passion.

This, it appears to us, was a question to be decided. And conceding the law to be clear that the defendant would not have been liable for the act of the conductor if it was willful and malicious on his part, still it was a question of fact.

It appears from the printed case that the motion to dismiss the complaint was made on the ground that the principal is not liable for the tort committed by the agent or servant, except it occurs in the immediate discharge of duty by the servant, or is authorized. As the motion was granted, it must have been assumed that the testimony showed that the act of the conductor was a tort, which did not occur in the immediate discharge of his duty, and was not authorized. But the testimony is not so clear as that the court could pass upon it without committing it to the jury for their consideration. From the testimony, as it appears to us in print, we could not so determine. On the contrary, the act of the conductor presents itself to us as one done without malice or ill feeling toward the plaintiff, but deemed by him necessary to effect the purpose with which he thought himself charged in the proper performance of his duty. It should have been left to the jury upon all the testimony, and with proper instructions. There was error in holding otherwise.

As the defendant has given stipulation for judgment absolute, there must be judgment final for the respondents, with costs.

All concur.

Judgment accordingly.

Downs v. N. Y. Central R. R. Co.

DOWNS v. NEW YORK CENTRAL R. R. CO.

47 New York, 88.

Negligence. The plaintiff, twelve years of age, while traveling with his mother upon the cars of the defendant, having surrendered his seat to a lady, went into another car, with his mother's permission, in search of a seat, which could not be found in the car where he was. In endeavoring to return, after the train had stopped at a station, he was thrown under the cars by a sudden starting of the train, and seriously injured. *Held*, that the mother's permitting him to pass alone from one car to another was not, under the circumstances, a negligent act.

Defendant offered in evidence a newspaper account of the injury to plaintiff, for which suit was brought; such account having been prepared from statements made to the writer by the plaintiff and others on the day and at the place of the accident. *Held*, that as this was not an original memorandum of the plaintiff's statements, or a correct copy of such a memorandum by the author, it was not competent evidence of such statements.

Statements by the plaintiff in an action for injuries received upon a railroad train, relative to the circumstances of the injury, having been given in evidence by the defendant,—*Held*, that other and independent declarations by him upon the same subject, at nearly the same time, but not part of the same conversation, were not admissible on behalf of the plaintiff.

Appeal from judgment of the general term of the supreme court, in the seventh judicial district.

This action was brought to recover damages for injuries received by the plaintiff while a passenger on one of defendant's trains, resulting from the negligence of defendant.

The plaintiff, who was at the time twelve years of age, took the cars, with his mother, on the morning of April 18, 1860, at Seneca Falls, for Boston.

At Syracuse, they entered a car of the express train going eastward, which would reach Rome, where the

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accident occurred; about eleven A. M. The car in which they were seated was crowded, and plaintiff surrendered his seat to a lady, and, after standing for a few miles, proposed to go forward into the smoking car, to which his mother, after some opposition, consented, directing him to return to her about noon.

When the cars stopped at Rome, he attempted to recross from the smoking car, but, by a sudden starting of the train, was thrown under the cars and seriously injured.

The jury rendered a verdict of seven thousand dollars in favor of the plaintiff.

J. R. Cox, for appellant.—The newspaper account was proper as evidence in connection with the testimony of the writer. *Gay v. Mead*, 23 *N. Y.* 465. Plaintiff could not prove his own declarations. *Williams v. Manning*, 41 *How.* 457.

F. Kernan, for respondent.—The article from the newspaper was properly excluded. *Law v. Merrill*, 6 *Wend.* 268, 277; *Stevens v. Vroman*, 16 *N. Y.* 381. It was competent for plaintiff to prove portions of the same conversations called out by defendant. *Bearse v. Copley*, 10 *N. Y.* 93. It was in the discretion of the court to allow leading questions. *Walker v. Dunsbaugh*, 20 *N. Y.* 170. The negligence of the mother is not a question. Plaintiff was *sui juris*. *McMahon v. Mayor, &c.*, 33 *N. Y.* 642; *Mangam v. Brooklyn R. R. Co.*, 38 *N. Y.* 455; *Hatfield v. Roper*, 21 *Wend.* 615; *Hanesburgh v. Second Ave. R. R.*, 33 *How.* 195.

ALLEN, J.—There was a conflict of evidence as to the circumstances under which the plaintiff received the injury complained of, and bearing on the question of negligence on the part of the defendant, and whether the plaintiff was chargeable with contributory fault. That

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the verdict is supported by evidence and cannot be disturbed by this court as wholly without proof, is not controverted by the counsel for the appellant. The question of fact, litigated upon the trial and submitted to the jury, was whether the plaintiff attempted to get off the cars while they were in motion, and in making the attempt fell under the cars, or whether after the cars had become stationary he made the attempt and was thrown by a sudden and unexpected starting of the train, and there is no complaint that the question was not fairly submitted to the jury with proper instructions. The jury have found upon evidence warranting the verdict, if believed, that the train had stopped and was not in motion when the plaintiff opened the door, and was in the act of going out and down upon the ground in the usual and ordinary manner, and was thrown from the platform by the sudden jerking of the car, and that the injury was the result of negligence on the part of the defendant's servants and agents. The jury have also by their verdict necessarily found, that the plaintiff was free from any negligence or fault contributing to the injury. Under the instructions, they could not have rendered a verdict for the plaintiff without finding that fact. The plaintiff, at the time of the accident, was twelve years of age, and being unable to find a seat in the car with his mother, by her permission went to the smoking car, and finding a seat there, remained in it until the train reached Rome, when in the effort to leave the car to return to his mother he received the injury in the manner described by the witnesses. It was not *per se* a negligent act on the part of the mother to permit a lad of that age, of ordinary capacity, to go from one car to another under the circumstances and for the purpose stated. It was submitted to the jury to determine whether there was anything in the youth, the inexperience or the want of ability of the plaintiff to take proper care of himself, which in the

absence of the protection and guidance of his mother, produced the injury, or contributed to produce it, and if there was, they were instructed to find for the defendant. This was as favorable a submission of the question as the defendant could have asked, and the jury have found adversely to the defendant upon it. Upon the trial the defendant was only held to the degree of care which the law exacts from carriers of persons in respect to all, and the plaintiff was held to the exercise of the same circumspection and care of his own person, and the same degree of responsibility for his own acts as is required of adults under the same circumstances. The jury have exonerated the plaintiff from all fault and negligence, and have charged the injury wholly to the negligence of the defendant. The verdict is well supported by the evidence, and the motion to dismiss the complaint at the close of the evidence was properly denied. The newspaper account of the transaction, as published in *The Seneca County Courier* a day or two thereafter, prepared by the publisher of the paper from accounts he received at Rome, on the day of the accident, was properly excluded. The author of the article was examined as a witness, but had no distinct recollection of anything that was said to him at Rome, and could not tell from whom principally he received his information; he talked with them all, the plaintiff and his father and mother. He talked with the plaintiff about it, and supposed he learned from him, but could not remember anything distinctly that he said, and in the course of his testimony said: "I can only say what I published then; these are the facts that I got at Rome. I cannot state distinctly whom I got them from. I talked with different persons. I was there all the evening at the hotel. Of course there was a great deal of excitement and talk about it." The witness, after his recollection had been refreshed by reading the article, was unable

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to testify that he received the statement sought to be given in evidence from the plaintiff, or from whom he did receive it. The article did not purport to be, and was not, in truth, a statement of a conversation with, or declarations made by, the plaintiff, and was not a memorandum made by the witness of a particular conversation at or near the time it was had, and which the witness could state under oath was a correct memorandum of such conversation. It was not, therefore, competent as evidence of a statement made by the plaintiff, material to the issue, or inconsistent with his testimony on the trial. The printed paper was not the original memorandum made by the witness; neither did he, nor could he, testify that the article, or the copy from which it was printed, was a correct memorandum or reproduction of the statement of the plaintiff, and it is not within the principle of any of the cases relied upon by the defendant. In all the cases, the original memoranda have been produced, and the persons by whom they were made have vouched for their correctness. *Grey v. Mead*, 22 *N. Y.* 462; *Halsey v. Sinsebaugh*, 15 *N. Y.* 485; *Russell v. Hudson R. R. Co.*, 17 *Id.* 134. The article was but a summary of the facts collected by the writer from all sources, or rather of his understanding of the facts. After the defendant had given in evidence, declarations of the plaintiff and of his mother in his presence, made in the presence of Dr. Pope and others, which it was supposed might be claimed to be inconsistent with statements of the plaintiff as a witness, the plaintiff recalled J. W. Hulbert, who had taken the plaintiff from under the cars, and had testified that he thought he had his hands on him from that time until the amputation, and examined him as to his recollection of conversation and declarations of and in the presence of the plaintiff during that time, and then propounded this question: "Did he state on that occasion (immediately on carrying him in), that

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the way the accident happened was, that he was standing on the threshold of the car and that the cars were jerked up and threw him under the train and that they ran over him, or in substance that?" To which the answer was: "That was the substance of his reply." The question was objected to as leading, and that it was incompetent to prove the plaintiff's declarations. The evidence was not inconsistent with the declarations proved by the defendant, but it did tend to corroborate testimony of the plaintiff by the fact that his statements had been consistent. This was not allowable. The conversation was not proved to have been a part of the same given in evidence by the defendant. Had it been so, the evidence would have been competent. The plaintiff could have proved the whole of a conversation, a part of which the defendant had given in evidence, if it was connected and all related to the same subject. *Bears v. Coply*, 10 *N. Y.* 93. But the case shows no connection between the declarations and conversations proved by the defendant, and those proved by the witness Hurlbert, or that they were simultaneous. The admission of this evidence was error. It was within the discretion of the judge at the trial to suffer a question, leading in form, to be put, and the judgment will not be reversed for an error in that respect. *Walker v. Dunsbaugh*, 20 *N. Y.* 170.

The evidence of negotiations for a settlement of the claim with the officers of the defendant for several years after the injury, was competent in explanation of the delay in bringing the action which had been brought out by the defendant; and which, but for the explanation, might have prejudiced the plaintiff.

The judgment for the error in the admission of evidence of the statements of the plaintiff to Hurlbert, must be reversed and a new trial granted.

All concurred.

Judgment reversed.

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UNION PACIFIC RAILWAY COMPANY v. HAND.

7 Kansas, 380.

Petition—Sufficiency ; effect of verdict. Whether, in an action to recover damages sustained by reason of the negligence of the defendant, it is necessary to aver that the injury was occasioned “without the fault of the plaintiff.”—*Query?* But if the omission be a defect, it cannot be taken advantage of after verdict, and in a reviewing court, for the first time.

Evidence—Remote ; competency. Testimony though somewhat remote is still legitimate if it tends to maintain the issues in the case.

Railway track—Defect—allegation and proof. Where the petition alleges the cause of plaintiff's injury to arise from a defective track, a defect in the track anywhere may be shown, if it contributed to the injury.

Care and skill—Diligence required. Railroad companies are required to use the utmost human sagacity and foresight in the construction of roads, to prevent accidents to passengers.

Damages—Excessive ; new trial. Where the amount of damages assessed in a verdict shows that the jury was influenced by passion and prejudice, it is the duty of the court to order a new trial of the case.

Error from Douglas district court.

On the 10th of April, 1867, Edwin W. Hand paid his fare and took passage in the cars of the Union Pacific Railway Company, at Junction City, for the purpose of going to Manhattan. When near Fort Riley several cars of the train ran off the track, the passenger coach, in which was Hand, upset, and Hand was injured. In August, 1867, he brought suit in the district court of Douglas county, to recover damages for the injuries he had sustained, claiming ten thousand dollars. In his petition the plaintiff alleged that the track of defendant's road between Junction City and Fort Riley “was at that time defective, unsound, and

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unfit to be used for that purpose," and alleging *scienter* and negligence on the part of the company. The defendants answered, interposing a general denial. The case was tried before a jury at the December term, 1868, when a verdict was returned in favor of the plaintiff, assessing his damages at five thousand dollars. The record is very voluminous. Exceptions were taken by the defendant to the competency and relevancy of testimony, to the refusal to give certain instructions, to the modification of other instructions, and to the overruling of a motion for new trial, which was asked on the ground that the damages were excessive, and were the result of passion and prejudice on the part of the jury. Upon all these points the facts are stated in the opinion of the court. Judgment being entered on the verdict in favor of the plaintiff, the defendant brings the case here by petition in error.

John P. Usher, for plaintiff in error.—1. The issue in this case is formed upon the averment in the petition that the road was defective within the reasonable knowledge of the defendant, and that *by reason of that defect* the car in which the plaintiff was riding *was thrown from the track* and plaintiff injured.

To prove that the road was defective at the time and place, the plaintiff offered and the court admitted testimony that it was in bad condition in the preceding month of March, and that one or more accidents had occurred in March to trains near the place in question. This was error. There was no evidence that other trains ran off the track from any *defect* in the road. The time of the running off of the train in March was too remote to raise a presumption of neglect in April. *Moss v. Johnson*, 22 Ill. 633; 1 *McLean*, 440; *Ang. on Carr.* § 592. The plaintiff can recover only for injury alleged, and as alleged.

2. The court erred in the refusal of the defendant's in-

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structions to the jury. The defendant had the right to the instructions as asked, or to be positively refused. They were refused, but given with a modification whereby they became the instructions of the court.

The company has discharged its duty to the passenger when it is shown that the track is in perfect condition for the running of the cars on the rail, and it is in the performance of that duty that the utmost skill, human sagacity and care is required; and the company is not chargeable with neglect of duty in omitting, all along the line of road, to provide all the imaginary safeguards to preserve its passengers from injury after the cars are thrown from the track.

It is with respect to the *well known* means employed by the carrier that the utmost skill, &c., is required. *Yarwood's Case*, 15 *Ill.* 468; *Fay's Case*, 16 *Id.* 566; *Deyo's Case*, 34 *N. Y.* 9.

3. The damages were excessive, and the court erred in not granting a new trial. The court, in overruling the motion for for a new trial, declared, and made it a matter of record, that the damages assessed beyond two thousand dollars were excessive. The judge formed the opinion that the damages were excessive from the evidence in the whole case, and an inspection of the plaintiff present, and a witness for himself.

The plaintiff had been injured, it is true, but the only permanent injury was in the knuckle to the fourth finger of the right hand—that was slightly displaced. If he had been killed outright by the negligence of the defendant, the utmost that could have been recovered was ten thousand dollars; and to say that he should have five thousand dollars for the displacement of a knuckle, justified and required the court to declare that it was excessive by all over two thousand dollars.

4. It should be noted that the petition in this case is defective, and upon which judgment for the plaintiff was not lawfully given. The defect consists in the

absence of any allegation that the injury was occasioned without the fault of the plaintiff. This allegation is as essential and necessary as it is to allege the negligence of the defendant. *Jeff. R. R. Co. v. Hendricks*, 26 *Ind.* 228; 34 *N. Y.* 9; 26 *Ill.* 373.

E. L. Aiken, and *Thacher & Banks*, for defendant in error:—1. There is no motion for a new trial made in this case. The judgment was entered in the case December 5, 1868. The record shows that the court adjourned on that day to Monday morning, December 7; that neither on that day, the 7th, nor on the 8th, was there any court held, the judge being absent.

In *People v. Bradwell*, 4 *Cow.* 445, it was held that where a court of oyer and terminer was to be held on Monday, but did not convene until Wednesday, all proceedings had on and after Wednesday were *coram non judice*. The court held there is no implied power of adjournment. In the case at bar the court had the entire day of the 7th to convene, but not after that. *People v. Lancher*, 24 *Cal.* 17. The court ceased to exist on the evening of the 7th; there being no power to adjourn the same by the sheriff.

Section 719 of the civil code applies only to the absence of the judge at the commencement of the term; in such case the sheriff may adjourn the court. There is no power of enlargement in the court. *Sedgw. Stat. Law*, 322.

All proceedings after the 5th of December are, therefore void, since none of them were commenced or instituted until on or after the 8th of December.

2. It is said that the petition does not state facts to constitute a cause of action, inasmuch as it does not state that the accident occurred to the plaintiff without his fault. Such averment was not essential. The leading work on railways holds in just so many words, that such an allegation is not necessary. 2 *Redf. on R.* 668;

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Smith v. Eastern R. Co., 35 *N. H.* 356; Richards v. Westcott, 2 *Bosw.* 589.

Redfield lays it down generally that, where the record shows the case to have been tried on its merits, a defective statement of facts, or an *omission* to state them, will not arrest the judgment.

3. The testimony respecting the defective track was admissible, both as to place and time. Other accidents had occurred at and near the same place, and within a few days of the time when plaintiff was injured. Many cases go to the point that the proving of the injury and accident throws the onus on the railroad company to show due care. 2 *Redf. on R.* 176, and cases cited; 2 *Pars. on Cont.* 295; 1 *McLean*, 540. And "things once proven to have existed in a particular state, are to be understood as continuing in that state until the contrary is proved by evidence." *Burr. on Circumstantial Ev.* 21.

4. There was no error in the instructions as given. It was the duty of the court to modify those asked by defendant, that the jury might not be misled.

The proposition that the company is bound to use the utmost human sagacity and foresight with respect to its road, is fully sustained by all the authorities. *Brown v. N. Y. Cent. R. Co.*, 34 *N. Y.* 404, 411; *Story on Bailm.* § 601.

The company must show human prudence could not have prevented accident, when presumption of negligence has once been raised. 2 *Redf. on R.* 200; *McKinney v. Neil*, 1 *McLean*, 550; *Peck v. Neil*, 3 *McLean*, 24; 2 *Pars. on Cont.* 224, 228, and notes; *P. & R. R. Co. v. Derby*, 14 *How. U. S.* 468.

5. The damages were not excessive. The time alone of the plaintiff was worth at least one thousand eight hundred dollars; his board and doctor's bills would carry the figures two to thousand dollars. That the jury, in estimating damages in these actions for in-

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juries to the person, are not only to take into consideration the loss of time, the attendant expenses, but also are to estimate the physical pain, suffering, liability to a shortened life from the injury, and all disability flowing from the alleged trespass, is undisputed law. *Moore v. Auburn R. Co.*, 10 *Barb.* 621; 2 *Redf.* 222; *Rawson v. N. Y. & E. R.*, 15 *N. Y.* 415. The plaintiff below was disabled in his hand for life, he was badly bruised, and suffered great pain; and for all this the jury gave him three thousand dollars above his actual loss.

In general, the amount of damages does not furnish evidence of passion or prejudice on the part of the jury. *Cole v. Perry*, 8 *Cow.* 214; *Ryckman v. Pachung*, 9 *Wend.* 469.

If there is no proof that the jury were actuated by wrong motives other than that arising from the verdict, and other reasons may be supposed to influence the verdict, the court will not impute an improper motive. 3 *Grah. & W. New Tr.* 1135, 1174.

There must be affirmative evidence, showing passion or prejudice on the part of the jury. *Hill Rem. for Torts*, 524; *Trainor v. Donohoe*, 9 *Cush.* 228; *Wells v. Sawyer*, 21 *Mo.* 354; *Payne v. Pacific, &c.*, 1 *Cal.* 33.

BY THE COURT.—KINGMAN, Ch. J.—I. The first of the various questions raised in the record is, that the petition is defective in this, that it does not state that the injury was occasioned without the fault of plaintiff. As the plaintiff does not have to prove this fact, it is not clear upon what ground it ought to be stated in the petition. If his negligence appears in the case as contributing to the injury, then he cannot recover; but this is matter of defense. We do not now decide the point. It was not made in the district court. The petition on any ruling states facts sufficient to uphold

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the verdict, and even if the omission was a defect, it could not be taken advantage of after verdict and in this court for the first time.

II. The next objection is to the admission of testimony. The petition states that the road was defective, and by reason of the bad condition thereof the cars were thrown from the track and plaintiff injured. To support this allegation, testimony was introduced tending to show that the accident took place on April 10, and that the road was in bad condition previous to that time, even in March, and that one or more accidents to trains had occurred at or near the same place in March. It is claimed that showing the road to be bad in March does not show that it was so on April 10. There was much conflicting testimony as to the condition of the road, and it was not improper to permit the plaintiff, who was a stranger, to show the condition of the road two or three weeks previous to the accident. It may have been somewhat remote, but really went to show the condition of the road at one time, and by other testimony tending to show that it remained in the same condition up to near the time of the accident, was proper to go to the jury. If a plaintiff was confined to the precise moment of an accident to prove the condition of the road, he would in almost every case be helpless; he must be allowed some latitude, and in this case it did not go too far. The same remarks apply to the testimony as to the accidents occurring in March to other trains. It is true, as claimed by the plaintiff in error, that they might have occurred from defective cars, or from bad management in the running of the trains; but at any rate they were facts, and connected as they were with this accident by being at and near the same points on the road, were properly submitted to the jury. If they did not show the road to be in bad condition they tended strongly that way.

III. The plaintiff in error complains of the instruc-

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tions of the court. We have examined them with great care, and will state our conclusions briefly. The issue is formed upon the averment that the track of the road of defendant was defective, and by reason of that defect the car in which plaintiff was riding as a passenger was thrown from the track, and the plaintiff injured. The jury were correctly instructed that the burden of proof was on the plaintiff to show the defect as alleged. The defendant below asked eleven instructions, four of which were given as asked. The others were given with a modification by the court, which was duly excepted to. The purport of these several instructions was, that if the road was good, or was perfect, or if the preponderance of the testimony showed the road to be good, or if it was to all appearance perfect, or if immediately before and after the accident the road was perfect at the time and place where the cars went off the track, then the plaintiff could not recover. Each of these instructions was really intended to accomplish but one purpose, and that was to confine the attention of the jury to the condition of the track at the *precise place* where the cars went off the track, and to each of them the court added this modification: "But if any part of the track from the place where the cars run off the track to the place where they turned over was not in good order and good condition, and caused or contributed to the injury of the plaintiff, the goodness of the track at the place where the cars run off will not excuse the defendant." The peculiar bearing of the instructions, and the importance of the modifications becomes apparent, when it is stated that the evidence shows that the train to which the accident occurred was running east; that it was a freight train, with a passenger car attached; that about seventy or eighty feet west of a bridge the passenger car and two or three freight cars run off the rails, and continued to run along side the rails across the bridge, which was

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one hundred feet in length, and until the train was stopped some seventy or eighty feet east of the bridge, when the passenger car tipped over, and the plaintiff received the injuries complained of. Now it appears from the testimony in behalf of the railroad company, that the train was running at the rate of six or seven miles an hour on a three-degree curve; that at the place where the car went off the rail, the track was in perfect order, and the rails were in perfect line after the accident occurred. According to the testimony of Smead, an engineer who examined the track immediately after the accident, it was unaccountable; that between the place where the cars ran off and where the passenger car tipped over, the track was thrown out of line, and the ties on the bridge were displaced. There was testimony showing that a different manner of constructing the bridge was, in the opinion of some engineers, safer than the one adopted in building the bridge where the accident occurred. It becomes important in deciding the propriety of the modification made by the court to the instructions asked by defendant below to bear in mind that the claim of plaintiff below rested on the allegation that the accident occurred by reason of a defective track. Whether the defect existed in the track at a place still further west than where the cars went off the track, or at the place, or at the bridge, or east of the bridge, it could make no difference, if the defect caused or contributed to the injury of plaintiff. If the plaintiff established the fact, it was all he had undertaken in his pleading, and all the law required him to do; and to this extent only the modification of the instructions went, and was properly made.

IV. At the request of plaintiff below, the court instructed the jury that, "if the defendant could have prevented the accident by the utmost human sagacity or foresight, with respect to their track, then the d

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fendant is liable." This is established law. The defendant sought to have it explained to the jury by requesting the court to tell them "that the utmost human sagacity required of the defendant did not require of the defendant to take such extraordinary measures in constructing, operating, and maintaining its railroad as are not and have not been in use in the constructing, operating, or maintaining of railroads." This the court refused to give, and its refusal is assigned as error, and we are asked to correct it. We know of no reason peculiar to this State why human life and safety are not as valuable here as elsewhere; at any rate, it is not the province of courts to cheapen it, by construing away established principles, laid down to make life secure.

Fault is found with other instructions, but hardly such as requires attention. We are convinced that the questions at issue were properly submitted to the jury, under instructions such as the law requires.

V. The plaintiff in error, in the motion for a new trial, set up as one of the grounds therefor that the damages assessed were excessive, and given under the influence of passion and prejudice. In overruling the motion for a new trial the court found that the assessment of the jury beyond the sum of two thousand dollars was excessive, but found nothing in the evidence or otherwise, save the amount of the verdict, to show passion or prejudice on the part of the jury; but inasmuch as the case was to be taken up on error on other grounds, which it was desirable to have settled, overruled the motion for a new trial.

An examination of the evidence has convinced us that the damages awarded are so excessive as to show plainly that the verdict was given under the influence of passion or prejudice, and ought to be submitted to the judgment of another jury. The only permanent injury the plaintiff received to his person, was in the

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"fourth metacarpophalangeal articulation of the right hand," which, being translated, means that there was an injury to the ligaments of the third finger of the right hand, causing a slight deformity, and some loss of power in the hand. Besides some bruises elsewhere, he had received an injury to his lung, which caused some uneasiness and renders him more liable by exposure to attacks of a pulmonary character. This injury was nearly overcome on May 1, 1867, according to the testimony of his own physician. There was some loss of time, but not great, for it appears that he was moving about in Kansas till he went to Chicago about April 20, and on May 8, it appears from one of his own witnesses he was traveling from Chicago to St. Paul. His business was selling lamps on commission, at which he was making twenty-five dollars per day, according to his own testimony. Take the testimony altogether, of which we have given but a few points most favorable to the plaintiff below, and we are constrained to send the case back for a new trial. Of course, courts are reluctant to interfere with the verdicts of juries on the ground of excessive damages; but to uphold them where a great wrong has been done, would, as a precedent, be doing an infinite wrong to the community. The rights of parties are submitted to the unbiased judgment of juries, not to their passions or prejudices, and where it is apparent that these feelings have entered into and influenced their decision, it becomes the duty of the court to see that a tribunal organized to secure justice is not perverted from its proper purpose to become the instrument of oppression and injustice.

The judgment is reversed and a new trial awarded on this ground alone.

BREWER, J., concurred.

VALENTINE, J., did not sit.

BALTIMORE & OHIO RAILROAD COMPANY
v. HARRIS.

12 *Wallace's Reps.* 65.

Railroad. Unity as corporation. When a company was incorporated in the State of Maryland with view of laying and operating a railroad beyond the limits of that State, in Virginia, and afterwards extended a lateral road into the District of Columbia, to authorize which extensions beyond the State line in the first case an act of the legislature of Virginia was obtained re-enacting the Maryland charter, and in the second case an act of Congress allowing the company to extend its road into the District of Columbia,—*Held*, that these separate enactments did not create distinct corporations, the corporate name, mode of business, powers and duties of officers being the same in all localities.

Jurisdiction. That suit might be maintained in the courts of the District of Columbia for personal injuries received by a passenger on the road in Virginia.

Limitation of liability. That right of the plaintiff in such case to maintain his action against the company in the District of Columbia was not affected by an announcement made upon the ticket received by him, that responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone.

Error to the supreme court of the District of Columbia.

The circumstances of the case and the pleadings are stated with sufficient fullness in the opinion.

Messrs. *Bradley and Buchanan*, for the plaintiffs in error.

Messrs. *T. I. D. Fuller and W. D. Davidge*, for defendant in error.

BY THE COURT.—SWAYNE, J.—This is a writ of error to the supreme court of the District of Columbia.

Baltimore, &c. R. R. Co. v. Harris.

Harris sued the Baltimore & Ohio Railroad Company for injuries which he received by a collision. The declaration sets out that the company is a corporation established by law by the name of the Baltimore & Ohio Railroad Company, having a legal and recognized existence within the limits of the District of Columbia, and exercising there their corporate rights and privileges in the making of contracts and receiving freight and passengers for transportation upon their roads from the city of Washington to the Ohio River; that at the city of Washington, on the 23rd of October, 1864, the plaintiff, wishing to be transported by the company over their roads to the Ohio River and towards the city of Columbus in the State of Ohio, for the sum of fifteen dollars, paid to the company, purchased of them a ticket for a seat and passage in their cars, to be transported along their roads from the city of Washington to the Ohio River and towards the city of Columbus; that in pursuance of this contract he took his seat in one of the cars of the company; that the company, in consideration of the money so paid, undertook and promised to transport him safely to the Ohio River; that the company managed their trains so negligently and carelessly that two trains, running in opposite directions, came in collision near Mannington, in the State of Virginia, whereby the plaintiff received the injuries complained of.

The company pleaded two pleas in abatement.

1. That the company was not an inhabitant of the District of Columbia when the writ was served.
2. That the company was not found in the District of Columbia when the writ was served.

To the first plea Harris replied that the company was an inhabitant of the District of Columbia by virtue of certain acts of Congress, the dates and titles of which are set forth, and that they had accepted the provisions of those acts and constructed their roads under them,

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availing themselves of the privileges thus conferred and doing business under them in the District of Columbia. To the second plea he replied that the company was found within the District of Columbia when the writ was served, and was within the jurisdiction of the court by virtue of the acts of Congress mentioned in the first replication.

The company demurred to these replications. The demurrers were overruled. The company thereupon filed the general issue of not guilty. The cause was tried by a jury and a verdict found for the plaintiff, upon which judgment was entered.

Upon the trial the counsel for the company prayed the court to instruct the jury that upon the evidence before them the plaintiff was not entitled to recover. The court refused to give this instruction, and the company excepted. Other exceptions appear by the record to have been taken, but they were not embodied in a bill of exceptions and we cannot therefore consider them. The errors insisted upon here, at the first argument of the case, were:

The overruling of the demurrers to the replications to the pleas in abatement.

The refusal of the court to give the instruction above set forth.

And that the declaration is fatally defective, wherefore the judgment should have been arrested and must now be reversed.

When the case was first considered by this court in conference, it was found that while all the judges were of opinion that the judgment should be affirmed, there was a difference of opinion upon the question whether the acts of Congress and the statutes of Virginia relating to the company created a new and distinct corporation in the District of Columbia and in the State of Virginia respectively, or whether they were only enabling acts in respect to the corporation under the name of

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the "Baltimore & Ohio Railroad Company," as originally created by the State of Maryland. Subsequently the question was ordered to stand for reargument, and it has been reargued by the counsel on both sides. As the solution of this question must determine, to a large extent, the grounds upon which the judgment of the court is to be placed, it is necessary carefully to consider the subject.

The Baltimore & Ohio Railroad Company was incorporated by an act of the legislature of Maryland, passed on February 28, 1827. On March 8 following, the legislature of Virginia passed an act whereby, after reciting the Maryland act, it was declared "that the same rights and privileges shall be, and are hereby, granted to the aforesaid company within the territory of Virginia, and the said company shall be subject to the same pains, penalties, and obligations as are imposed by said act, and the same rights, privileges, and immunities which are reserved to the State of Maryland or to the citizens thereof are hereby reserved to the State of Virginia and her citizens."

Several other statutes relating to the company were subsequently passed in Virginia, but they do not materially affect the question under consideration, and need not be more particularly adverted to. By an act of the legislature of Maryland, of February 22, 1831, the company was authorized to build a lateral road to the line of the District of Columbia. On March 2, 1831, Congress passed an act which, after reciting, by a preamble, the original act of incorporation, enacted "that the Baltimore & Ohio R. R. Company, incorporated by the said act of the General Assembly of the State of Maryland, shall be, and they are hereby, authorized to extend into and within the District of Columbia a lateral railroad." . . . "And the said Baltimore & Ohio R. R. Company are hereby authorized to exercise the same powers, rights, and privileges, and

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shall be subject to the same restrictions in the construction and extension of the said lateral road into and within the said district as they may exercise or be subject to under or by virtue of the said act of incorporation in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, benefits, and immunities in the use of said road and in regard thereto as are provided in the said charter, except the right to construct any lateral road or roads in said district from said lateral road." A number of local regulations follow, which are not material to be considered. A supplementary act of the legislature of Maryland, passed March 14, 1832, provided that the stock issued by the company to complete this lateral road "shall, united, form the capital upon which the net profits derived from the use of said road shall be apportioned," &c.

The acts of Congress of February 26, 1834, and of March 3, 1835, are confined to matters of detail, and may be laid out of view.

When the case was reargued as directed by this court, the counsel for the company admitted that the acts of Congress in question were only enabling acts, and that they did not create a new corporation, but they insisted that the acts of Virginia were of a different character, and that they worked that result.

As regards the point under consideration, we find no substantial difference. In both, the original Maryland act of incorporation is referred to, but neither expressly or by implication create a new corporation. The company was chartered to construct a road in Virginia as well as in Maryland. The latter could not be done without the consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to the question before us, they were the same as to powers, privileges, obligations, restrictions, and liabilities, as

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those contained in the original charter. The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. In its name, locality, capital stock, the election and power of its officers, in the mode of declaring dividends, and doing all its business, its unity was unchanged. Only the sphere of its operations was enlarged.

In what it does in Virginia the same principle is involved as in the transactions of the Georgia corporation in Alabama, which came under the consideration of this court in *Bank of Augusta v. Earle*, 13 *Pet.* 588. The distinction is that here the assent of the foreign authority is express, while there it was implied. A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires* which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter. It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly. For the purposes of federal jurisdiction it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted. There is a presumption of law which is conclusive.

We see no reason why several States cannot, by competent legislation, unite in creating the same corporation or in combining several pre-existing corpora-

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tions into a single one. The Philadelphia, Wilmington & Baltimore Railroad Company is one of the latter description. In the case of that company against Maryland, 10 How. 392, Chief Justice TANEY, in delivering the opinion of this court, said: "The plaintiff in error is a corporation composed of several railroad companies, which had been previously chartered by the States of Maryland, Delaware, and Pennsylvania, and which, by corresponding laws of the respective States, were united together and form one corporation, under the name and style of the Philadelphia, Wilmington, and Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore." He gives the history of the legislation by which this result was produced. No question was raised on the subject, but the opinion assumes the valid existence of the corporation thus created. The case was brought into this court under section 25 of the Judiciary Act of 1789. The jurisdictional effect of the existence of such a corporation, as regards the Federal courts, is the same as that of a copartnership of individual citizens residing in different States. Nor do we see any reason why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quo ad hoc* any property within its territorial jurisdiction. That this may be done was distinctly held in *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black, 297. It is well settled that corporations of one State may exercise their faculties in another, so far, and on such terms, and to such extent, as may be permitted by the latter. We hold that the case before us is within this latter category. The question is always one of legislative intent, and not of legislative power or legal possibility. So far as there is anything in the language of the court in the case of *Ohio & Mississippi Railroad Co. v. Wheeler*, in conflict with what has been here said, it is intended to be restrained and quali-

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fied by this opinion. We will add, however, that as the case appears in the report, we think the judgment of the court was correctly given. It was the case of an Indiana railroad company licensed by Ohio, suing a citizen of Indiana in the Federal court of that State.

In *Baltimore & Ohio Railroad Co. v. Gallahue*, 12 *Gratt.* 658, it was held by the court of appeals of Virginia that the company was suable in that State. In this we concur. We think this condition is clearly implied in the license, and that the company, by constructing its road there, assented to it. The authority of that case was recognized by the court of appeals of West Virginia, in *Goshorn v. Supervisors*, 1 *W. Va.* 308, and in *Baltimore & Ohio Railroad Co. v. Supervisors*, 3 *Id.* 19. Here the question is whether the company was suable in the District of Columbia. In the case reported in *Grattan*, it was said: "It would be a startling proposition if, in all such cases, citizens of Virginia, and others, should be denied all remedy in her courts for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister State to seek redress." The same considerations apply to the case before us. When this suit was commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that Congress intended that the important powers and privileges granted should be followed by such results.

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But turning our attention from this view of the subject and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought in all respects as if it had been an independent corporation of the same locality.

We will now consider, specifically, the several objections to the judgment, relied upon by the plaintiffs in error.

The pleas in abatement were bad. The demurrers reached back to the first error in the pleadings, and judgment was properly given against the party who committed it. If the replications were bad, bad replications were sufficient answers to bad pleas. But it is said the declaration was bad, and that the demurrers brought the defect in that pleading under review. The principle has no application where the defect is one of form and not of substance.

The alleged defect in the declaration will be considered in connection with the error assigned relating to that subject. But if the court decided erroneously, the company waived the error by pleading over in bar. If it were desired to bring up the judgment upon the pleadings for examination by this court, the company should have stood by the demurrers. In the proper order of pleading which is obligatory a plea in bar waives all pleas, and the right to plead, in abatement.

The bill of exceptions which brought upon the record the refusal of the court to instruct the jury that the plaintiff was not entitled to recover, exhibits, among others, the following facts: Harris contracted, paid his money, and received his tickets at the city of Washington. The tickets consisted of three coupons—one for his passage from Baltimore to Columbus, Ohio; another for his passage from Washington Junction to Baltimore, and the third for his passage from Washington City to Washington Junction. It is ne-

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cessary to consider only the two last mentioned. They are both headed "Baltimore and Ohio Railroad," and signed "L. M. Cole, general ticket agent." Above the coupon first mentioned is this memorandum: "*Responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone.*" Each coupon has printed on its face the words "Conditioned as above." The coupon last mentioned gave Harris the right of passage over the lateral branch both in the District of Columbia and in Maryland. The second coupon gave him the same right in respect to the main stem both in Maryland and in Virginia.

The instruction asked for assumed erroneously that there were two corporations under the same name, one of them in Virginia, and that the latter was liable and alone liable to the plaintiff. The attempted limitation of responsibility by the memoranda at the head and on the face of the coupons proceeded upon the same erroneous assumption as to the quality of the corporate ownership of the roads.

These views are sufficiently answered by what has been already said upon the subject. But if we concurred with the counsel for the plaintiff in error we should then hold that the agent who issued the coupons was the agent of both corporations; that the contract was a joint one; and that it involved a joint liability, unless the knowledge of the memoranda on the coupons and the assent of the plaintiff were clearly brought home to him. In all such cases the burden of proof rests upon the carrier. The bill of exceptions does not show that any testimony was given upon that subject. The court was asked to assume that the limitation on the face of coupons was itself conclusive, and to instruct the jury accordingly. But having held the unity of the corporation, of the proprietorship of the roads, and of the contract, it is needless further to consider

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the case in this aspect. The instruction asked for was properly refused.

The jurisdiction of the court was not governed by the eleventh section of the Judiciary Act of 1789. It did not depend upon the citizenship of the parties. It was controlled by acts of Congress local to the district. A citizen of the district cannot sue in the circuit courts of a State. If a corporation appear and defend in a foreign State it is bound by the judgment. If the declaration were insufficient, the additional averments in the replications admitted by the demurrer to be true, cured the defect.

Judgment affirmed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY v. JACKSON.

55 Illinois, 492.

Allegations and proofs—variance. In an action against a railroad company to recover for injuries received by the plaintiff by reason of the alleged negligence of the company, it was averred in the declaration that the accident happened while the plaintiff was acting as a brakeman on a freight train of defendants, while the proof showed he was acting as a brakeman in switching cars at a station, in making up a freight train. *Held*, there was no variance in respect to the character of the train.

Negligence in railroads—relative duties of the companies and their servants. It is the duty of railroad companies to furnish to their employees safe materials and structures to be used by the latter in the performance of their duties; and although the machinery employed upon a railroad may be furnished through the servants of

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the company, yet that fact will not relieve the company from their liability to the other employees, in different departments, who may receive injuries by reason of defective machinery.

So where a brakeman upon a freight train was injured in descending a ladder on one of the cars, in obedience to a signal from the engineer, the injury being occasioned by the absence of some rounds from the ladder, it was *Held*, the brakeman should not be prejudiced as to the right of recovery against the company, by the negligence of those servants of the company having charge of the inspection and repair of their cars, as they were superior to him in authority, and notice to them of the defect was 'notice to the company.

It is also the duty of the servants of the company to see that machinery used by them in the performance of their duties is in fit condition for use, and to report defects to the company; but this is subject to the qualification that the servant so using the machinery has knowledge of its defects, or, by reasonable precaution, might have such knowledge.

So if a brakeman on a freight train receives injuries in attempting to descend a ladder on one of the cars, on account of the absence of some rounds from the ladder, should it appear that the car having the defective ladder had been used while he was brakeman on the train of which it was a part, he would be presumed to know of its condition, and required to govern his conduct, in the use of the ladder, in reference to such defect. But whether the brakeman would be chargeable with such knowledge of the defect as to impair his right of recovery for the injuries, is a matter for the jury to determine from all the circumstances in proof.

Excessive damages. In such a case the brakeman, in attempting to descend the ladder while the train was in motion, in obedience to a signal from the engineer, lost his hold by reason of the defect mentioned, and fell to the ground, the wheels of the cars passing over his legs and crushing them so that amputation became necessary, a verdict of eighteen thousand dollars recovered by the brakeman was regarded so excessive that it should be set aside.

In such an action against the company, the plaintiff is entitled to compensation, not to vindictive damages, as corporations are not liable to more than compensatory damages, unless the injury is wanton or willful.

Although the plaintiff was almost unfitted for business by reason of his injuries, yet the company should not have been required to render to him a sum which would produce a greater income than he could have earned had he not been injured.

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Appeal from the circuit court of Kane county.

The opinion states the case.

Mr. A. M. Herrington, for the appellants.

Messrs. *Blanchard & Silver*, and Messrs. *Joslyn & Slavin*, for the appellee.

BY THE COURT.—WALKER, J.—This was an action on the case, brought by appellee, in the Kane circuit court, against appellants, to recover for injuries received by falling from a car, and having his legs so badly injured or crushed by the engine passing over them that they had to be amputated.

It appears that on Monday morning, November 18, 1867, appellee, who was employed by the company as a brakeman, while engaged in the discharge of his duty, and being on the end of a freight car, holding to an iron rod, in obeying an order from his superior, in attempting to descend from the car for the purpose of uncoupling it from the engine, swung himself around so as to descend by a ladder on the side of the car, but owing to the fact that it was out of repair, lacking two rounds, that were missing, he failed to get a hold for his feet, and the weight of his body broke his hold of the iron rod, when he fell to the ground, and the engine, which was backing at the time, passed over his legs and crushed and injured them so that amputation became necessary.

The jury found a verdict in his favor, and assessed the damages at eighteen thousand dollars. A motion for a new trial was entered by defendants, but was overruled by the court, and judgment rendered on the verdict. An appeal was perfected, and the case is brought to this court and errors are assigned on the record. They question the correctness of the decision

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of the court in giving instructions for plaintiff, and in the refusal to give others for the defendants, the admission of evidence, and in overruling the motion for a new trial.

It is first insisted that there was a variance between the declaration and the proof; that in the declaration it is averred that the injury occurred while appellee was acting as a brakeman on a freight train of appellants, while the proof shows that he was acting as a brakeman in switching cars at the station, in making up a freight train. There is no dispute but the three or four cars being switched were freight cars, and were being propelled by an engine, and were what is generally understood to be a freight train. It was a train of freight cars, and therefore a freight train. It was a train used for the transportation of freight, as contradistinguished from a train composed of cars usually employed in transporting passengers, and called a passenger train. In this we perceive no variance, and the evidence was properly admitted for the consideration of the jury.

It is next urged that appellee was guilty of negligence in not seeing and knowing the ladder was defective, and in attempting to descend, in not placing his feet upon the two lower rounds of the ladder.

This was a question fairly falling within the province of a jury to determine. But when it is remembered that he occupied a subordinate, although a highly responsible place, requiring vigilance, with prompt action, it is not to be expected or required that he should act with that deliberation and circumspection as persons having more time and less pressed to prompt action in the performance of their duty. In the discharge of his duties on a switch he must keep a constant watch for the signal from his superior, which, to him, is a peremptory order, requiring instant obedience. This being so, we could not expect him to deliberately

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examine a ladder to see whether it was in repair. He, no doubt, seated himself so as to be in position, when ordered, to swing himself around on the ladder and descend in the shortest space of time possible, to uncouple the train from the engine, and, keeping a constant look for the signal, he probably did not see the ladder, but knowing it was there, felt sure that he could use it in the discharge of his duty, and hence did not observe the defect.

It is again urged that it was the duty of the appellee to see and know the condition of these steps, and the case of *Illinois Central R. R. Co. v. Jewell*, 46 Ill. 99, is referred to in support of the position.

It is there said the condition of the brake is under the special care of the brakeman, and that it is his business to see that it is in a fit condition for use, and to report defects to the company. While this is true, it is with the qualification that the brakeman knew, or could by reasonable precaution know, of the defect. If the defect is inherent from improper material, or from unskillful workmanship, and the defect had not been developed, he should not be held to have known the fact, and to report to the proper department. As to these steps, there was no direct evidence whether appellee previously knew or could have known of this defect. If this car had been used by the road while he was a brakeman on the train of which it was a part, then he would be presumed to have known of its condition, and required to govern his conduct in reference thereto. This was a matter of inference from the evidence in the case, to be determined by the jury, from all the circumstances in proof.

It is held to be the duty of these companies to furnish to their employees safe materials and structures. Such an obligation is permanent and can not be avoided by them by delegating the power to others, and the understanding with their servants is direct, that they

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will furnish suitable and safe materials and structures. Chicago & Northwestern R. R. Co. v. Swett, 45 Ill. 197.

This car was placed upon the road by some one superior to appellee in authority, and he was acting under such authority. The jury might reasonably infer that those placing it on the road knew its condition. He had no choice but to obey orders, and was compelled by those above him in authority to ascend the car and again descend and uncouple the car from the engine when required. He was not, and could not be, responsible for the defect. Nor should he be held liable for the defective car, as he neither furnished it nor placed it on the track. Nor should he be responsible for the acts of those who did, as fellow servants, as the fault was not that of such a servant engaged in the same department of the common business. It was the act of a superior, in another department.

It was held in the case of Chicago & Northwestern R. R. Co. v. Sweet, *supra*, that, although a railroad company may construct their road and furnish its machinery through its servants, yet other employees, in different departments are not to be prejudiced by the negligence of such servants.

Again, in the case of Illinois Central R. R. Co. v. Jewell, *supra*, it was held that where the company had employed a reckless and incompetent engine driver, and his character was liable for the death of a brakeman killed by the recklessness or improper conduct of such driver. Hence, in this case, appellee should not be prejudiced by the negligence of those having charge of the inspection and repair of their cars as they were superior to him in authority, and their notice of defect was notice to the company, as they can only receive notice through the proper officers of the road.

We have carefully examined the instructions of appellants, which were refused, and find that all of them

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embodying principles applicable to the case were substantially given in their other instructions. We can perceive no objection to those given for appellee. The instructions given for appellants were all and were more than they had a right to have given. The jury seem to have been warranted in finding the issues for appellee.

We now come to the consideration of the question of damages. Eighteen thousand dollars is so large a sum that we regard it excessive. That amount put at interest, at the highest legal rate, would produce, annually, eighteen hundred dollars,—more, by a large sum, than is obtained by the most skillful mechanics for their labor, while appellee, in the pursuit of his calling, as a brakeman, could probably not have received more than one-third of that sum. It is true that appellee has received a grievous injury, and has been rendered almost unfitted for business, but the railroad company should not be required to render to him a sum which would produce a greater income than he could have earned had he not been injured. He is only entitled to compensation, and not to vindictive damages, as corporations are not liable to more than compensatory damages, unless the injury is wanton or willful, and that is not the case in this record. But we can see, that after deducting physicians' bills, loss of time and other expenses, including counsel fees, the sum left, would, at interest, produce an annual sum largely above any amount he could have expected to earn, had he not been disabled.

This verdict seems to have been the result of passion or prejudice, and not of calm and dispassionate reflection. The finding must be in proportion to the injury sustained, and when it is greatly excessive, as it is in this case, it will be set aside. The judgment of the court below is reversed, and the cause remanded.

、 Judgment reversed.

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49 *Missouri*, 167.

Damages—Railroad—Negligence—Selection of employee, care used in—Pleadings. A master is bound to use due care and diligence in the selection and employment of his agents and servants, and for want of such care is responsible to all other servants for any damage that may arise. But in such case his responsibility is for his own negligence, and not merely for that of his servants. Hence an action against a railroad company for the killing of an employee by a co-employee, which charges that defendant failed to employ skillful servants, but fails to allege want of care and diligence in the selection of servants, is bad on demurrer. If the officers have made careful inquiry into the habits and competency of the employees, and upon such inquiry believe and have reason to believe them sober, competent and careful, they are not liable for the injuries resulting from the negligence of the co-employee.

And the mere allegation that defendant allowed its employees to neglect their duties, without alleging how or wherein, is not sufficient to charge liability on the company.

Error to Cole circuit court.

J. N. Litton, for defendant in error.—I. The second count is demurrable under the third section of the damage act. *Wagn. Stat.* 520. Unless the master was guilty of the lack of ordinary care in the selection of servants, he is not liable. *McDermott v. Pacific R. R.*, *Mo.* 115; *Rohback v. Pacific R. R.*, 43 *Id.* 187; *Gibson v. Pacific R. R.*, 46 *Id.* 169; *Warner v. Erie*, 39 *N. Y.* 468; *P. & Ft. W. R. R. v. Devereaux*, 17 *Ohio*, 197. The plaintiff clearly intended to charge defendant with personal negligence in this, that it did not use ordinary care and diligence in the selection of its servants, but has failed to do so. Negligence cannot be charged by inference, but must be by direct, positive and traversa-

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ble averment—by declarations that directly tender to defendant an issue on negligence, the gist of the action—otherwise it is bad on demurrer. *Brown v. Harmon*, 21 *Barb.* 508; 10 *Minn.* 71; *Griggs v. Upham*, 9 *Id.* 246; *P. & C. R. R. v. Kelly*, 23 *Ind.* 133; 10 *Allen, Mass.* 301; *Atwood v. Caswell*, 19 *Pick.* 495; *Buffalo v. Holloway*, 7 *N. Y.* 498.

II. It is stated that defendant authorized and allowed its servants to neglect their "duties." This word is a mere nullity. The pleader must state what duties, whether duties to defendant, duties imposed upon every man alike by the law of the land, or duties imposed by christianity and morality. Judging from the pleading, it is the latter duties to which the pleader refers. This is entirely insufficient. *Buffalo v. Holloway, supra*; 2 *Duer*, 678; 43 *Mo.* 546; 37 *Id.* 330; *Ticknor v. Voorhies*, 46 *Id.* 110. It is a mere conclusion of law or of the pleader, no allegation of fact. *Anderson v. Jaccard*, 32 *Mo.* 188; *Stearns v. Stearns*, 30 *Vt.* 216; 3 *Gray (Mass.)* 484.

H. Flanagan and G. T. White, for plaintiff in error.

BY THE COURT.—BLISS, J.—A minor son of the plaintiff was killed while in defendant's employ, and she brings this action under the act concerning damages, &c. *Gen. Stat.* 1855, ch. 147; *Wagn. Stat.* 519. The petition contains three counts, but it is unnecessary to consider the first, inasmuch as a motion to make it more definite was affirmed by consent, and the plaintiff, instead of amending, took a voluntary nonsuit as to this court.

The second count alleges, in substance, that it was defendant's duty to employ careful and skillful servants in running its trains; that defendant failed to do this, by reason of which, while aiding in running the train, the plaintiff's minor son, in defendant's employ,

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was wounded and disabled, and for many hours was exposed to the cold upon the road, though the incompetency and want of care of such servants, and not by his own negligence, from which he died.

The third count substantially charges that plaintiff's minor son, being in the employ of defendant upon a freight train, as one of its servants, was so injured by falling from the train and exposure to the cold as to cause death; that this was caused by defendant's allowing its employees to neglect their duties, and to suffer and cause deceased to be thrown from the train, by which he was injured and suffered to remain in the cold a long time, when he could have been removed, and not by his own fault, &c.

No objection was made to the statement of the same cause of action in different counts, but a demurrer was sustained as to the second and third, and judgment entered upon the demurrer, to reverse which the plaintiff has sued out his writ of error.

The pleader has attempted to base these counts upon the third section of the act, which provides that a cause of action which arises from personal injuries shall survive, notwithstanding the death of the injured party, if it be caused by the injury. We have then only to inquire whether these counts would show a liability to the plaintiff's son at common law, for the pleader does not attempt to bring the defendant within the liability created by the second section of the statute.

That the master is not liable to one of his own servants for the negligence of other servants is conceded. But the pleader attempts in the second count to charge negligence in their employment. Had he done so the pleading would have been good, for the master is under obligation to use due care and diligence in the selection and employment of his agents and servants for any damage that may thence arise. *Harper v. Ind. &*

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St. Louis R. R. Co., 47 *Mo.* 567. In such case the responsibility is not for negligence merely of his servants, but for his own. The count, however, fails to make any such charge. The plaintiff alleges that it was defendant's duty to employ careful and skillful servants, &c., but that it failed to do so, but he does not charge any want of care and diligence in the performance of his duty.

Railroad companies and other carriers of passengers, as to such passengers, are held to insure the care and diligence of their servants. As between them and the carrier, there is a contract which is violated by any want of care on the part of its employees, and a railroad company is just as responsible if its officers have taken extraordinary pains in their selection as though wholly reckless in that regard. But as to its servants there is no such contract, and hence there is no guaranty of their care and diligence toward each other. The company is only liable, as all are liable, for its own want of care.

The pleader evades the real question and tenders an immaterial issue. It is the duty of defendant's officers to employ proper servants, but the duty is not an absolute one. If they make careful inquiry into the habits and competency of the men employed, and upon such inquiry believe and have reason to believe them sober, competent and careful, they can do no more; they have honestly and faithfully endeavor to do their duty, and there is no contract for anything more. Hence the pleader should have charged a want of care and diligence in the selection of defendant's servants, and not a failure merely to select those who were competent, for such failure may be consistent with proper care.

In the third count the injury is said to have been caused by defendant's allowing its employees to neglect their duties. How? Wherein? Did the company

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give directions to its conductors or brakemen, the observance of which would tend to throw other employees from the train, or prevent it from being stopped to pick them up? Was there any extraordinary rule or regulation inconsistent with the plaintiff's safety? Or was there habitual or even occasional neglect of duty, which, coming to the knowledge of the company's managers, was actually or tacitly approved by them, and by which approval such neglect may be said to have been allowed? No fact is stated, but an inference merely; no ground for that inference is given, and the pleading is too loose to charge anything.

The whole argument of plaintiff's counsel is outside the pleadings. In considering the company's liability as charged, we might well say that it was the conductor's duty to stop the train and pick up one who had fallen—that it would be an inexcusable act of inhumanity not to do so—and still not hold the company responsible.

If there was any liability it was under the second section of the statute, which creates a special one; but the first count, based upon that section, was, as we have seen, abandoned, and the counts considered, fail in the allegations necessary to bring the case under it; nor does there seem to have been any attempt to do so, but only to charge a liability outside of this section.

The other judges concurring, the judgment will be affirmed.

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49 *Missouri*, 274.

Evidence—Experts, testimony of. Where the experience of a witness is of such a nature that it may be presumed to be within that of all men of common education moving within the ordinary walks of life, the evidence of opinion is improper. The jury must draw their own inference.

Damages—Railroad—Evidence—Offer of charity. In suit for damages against a railroad company for killing plaintiff's husband proof of a letter from the president to plaintiff, containing an offer of money as a charitable donation, but in no way admitting any legal liability, although strictly improper for relevancy, would not be calculated to work harm to defendant, and would not justify a reversal of the cause.

Appeal from Johnson circuit court.

J. N. Litton, for appellant.—I. The court erred in permitting the letter of Taylor to be read in evidence.

II. The court erred in refusing to allow the conductor to answer the question as to what would have been the effect if Gavisk had held on to the brake. There is no objection to it on the ground that he was not an expert. He had been brakeman and conductor eleven years, and, feeling shocks twenty times a day, it would be impossible to produce a man better qualified to answer the questions, and state whether the shock was sufficient to throw off a man who had braced himself as a man of Gavisk's occupation was required to do. He was an expert. *Keim v. St. Louis Mutual Ins. Co.*, 40 *Mo.* 26; 1 *Greenl. Ev.* 482, § 440.

H. B. Johnson, for respondent.—The letter of Geo. R. Taylor to Emma G. Gavisk, written, as the evidence shows, with direct reference to the subject-matter of

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this suit, constitutes an admission of the independent facts that James Gavisk was killed by the agents and employees of the railroad company, and that Emma G. Gavisk was at the time of his death his lawful wife. The rule of law is that an admission of an independent, collateral or indifferent fact, though made during treaty for compromise, is admissible. *Phil. Ev.* 431 and notes; 1 *Greenl. Ev.* § 192 and notes; *Murray v. Coster*, 4 *Cord*, 635-6; *Marvin v. Richmond*, 3 *Den.* 58; *Harrington v. Inhabitants of Lincoln*, 4 *Gray*, 563; *Cole v. Cole*, 34 *Me.* 542; *Corinth v. Lincoln*, *Id.* 310; *Fuller v. Haupton*, 5 *Conn.* 416; *Sanborn v. Neilson*, 4 *N. H.* 501; *Mount v. Bogert*, *Anthon*, 190; *Turner v. Railton*, 2 *Espin.* 174; *Murray v. Coster*, 20 *Johns.* 576; *Hartford Bridge Co. v. Granger*, 4 *Conn.* 1421; *Marsh v. Gold*, 2 *Pick.* 285-90; *Gerrish v. Sweetser*, 4 *Id.* 374-7; *Delogny v. Rentoul*, 2 *Mart.* 175; *Church v. Steele*, 1 *A. K. Marsh*, 328; *Waldridge v. Kenison*, 1 *Espin.* 143; *Slack v. Buchanan*, *Peake Cas.* 5, 6; *Tait on Ev.* 293. If evidence is admissible under any issue in the case, for any purpose, it should not be excluded. *Ruggles v. Gatton*, 50 *Ill.* 412.

Wm. Douglas, for respondent.—I. Even if there was error in admitting the letter of the president of defendant, that was not such an error as materially affected the merits of the action, and therefore this court cannot reverse the judgment for that reason. Without that letter the verdict must have been the same. *Gen. Stat.* 1865, p. 548, § 40.

II. But there was no error in admitting that letter. It was not an offer of compromise. It was an offer to pay a sum of money. It was made before the litigation commenced. It was not stated "expressly" or otherwise to be made without prejudice, nor was it made under any pending treaty. It does not come within either the English or American rule of excluding com-

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promise. 1 *Greenl. Ev.* § 192 and notes; *Ferry v. Taylor*, 33 *Mo.* 333.

BY THE COURT—BLISS, J.—This suit was brought under the second section of the damage act. *Wagn. Stat.* 519. The plaintiff's husband was employed by the company about a switch, and among his duties was to get on cars and let off and set brakes. A freight train was coming, and the conductor desired to throw eleven of the cars on the switch without stopping the train. To do this the conductor detached the engine while running, and then detached the eleven cars from those following. The switch was thrown open after the engine passed, so that the eleven cars entered upon the side-track, and then closed in time for the others to follow the engine. Two cars were standing upon the side-track with brakes set, and as the engine passed, the engineer called out to Gavisk to jump upon them and loose the brakes. He did so, swung his light (it was dark) toward the cars approaching, calling out, "Go slow, go slow!" They struck the car upon which he was standing, and he fell between the cars and was instantly killed.

Upon the trial, the plaintiff's witnesses testified that the cars came upon the switch at an unusually rapid and dangerous rate; that it was a down-grade, &c.; but the conductor testified that the running was not more rapid than necessary to make the switch, and much less than the other witnesses had testified to. The plaintiff obtained judgment.

While the conductor was upon the stand, and after testifying to his experience upon railroads, he was asked to "state whether or not, if James Gavisk had, at the time of the cars striking, been holding on to the brakes and exercising ordinary care and prudence in his own protection and preservation, he would have been thrown from the cars." This question was ob-

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jected to and ruled out, and properly so. The only pretext for its admission would be upon the ground that he was not an expert. An expert is supposed to have some special knowledge over and above men of ordinary education, derived from his peculiar pursuits or experience, that entitles his opinion to be received in evidence. But "when this experience is of such a nature that it may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference." *N. E. Glass Co. v. Lovell*, 7 *Cush.* 321; see also *White v. Ballou*, 8 *Allen*, 408. To have permitted this question would have been to take the case from the jury and submit it to the witness, and there was no fact involved in it that required peculiar or professional knowledge.

The court admitted the following letter in evidence, and its admission is assigned for error:

"PRESIDENT'S OFFICE, PACIFIC RAILROAD, }
"ST. LOUIS, July 23, 1868. }

"TO EMMA G. GAVISK, Knobnoster, Johnson Co., Mo. :

"Madam: At a meeting of the directors last Tuesday I was instructed to pay you as a donation, &c., \$250. I am necessitated to go to New York this afternoon, and on my return (about the 20th of August) will remit you the money. Respectfully,

"E. G. GAVISK. G. R. TAYLOR, President."

I do not think this letter should have been admitted. It was irrelevant, and its production would have a tendency to check charitable donations by the company to those who suffer in their employ, when there is no legal liability. And yet I cannot see how the defendant was injured by it upon this trial. It admitted nothing; it was simply an offer of charity to the suffering wife of an employee; and without going into the questions raised by counsel in relation to such offers, supposing

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them to be admissions, it is not such an error as should reverse the judgment.

Other questions were raised, of less weight than those considered, which I will not specify. The case was tried fairly, and the verdict was warranted by the evidence. The deceased was zealous in the performance of his duty; in making the running switch, which at all times requires great care and skill, the cars came in collision; with one hand he was swinging his light to warn the conductor, and it cannot be shown whether he was holding on to the brake with the other and his hold was broken, or whether, in his eagerness to arrest the coming train, he neglected this precaution; but there can be no presumption of carelessness. The only conflict of evidence was in relation to the rapidity with which the cars entered the switch, and the jury necessarily passed upon that matter, and believed the witnesses for the plaintiff. We cannot say they were mistaken.

Judgment affirmed

ADAMS, J., concurred.

WAGNER, J., was absent.

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BACHES.

55 Illinois, 379.

Negligence—in railroads—mode of switching cars. A railroad company, in transferring two empty platform coal cars from the main to a side track, employed the mode known as the "running" or "flying switch," which is done by attaching the cars designed to be thrown upon the side track to the engine, when the train is put

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in motion running toward the switch, and before it is reached, and when sufficient momentum to answer the purpose has been acquired, the engine is detached and run ahead of the train, and after it passes, the switch is changed, and the cars thus detached, by the momentum thus acquired, are carried along the side track to the point intended, it was *Held*, in thus switching their cars in a populous part of a city of ten or twelve thousand inhabitants, crossing a traveled street and along an alley used by the public, the cars thrown upon the side track having a momentum which carried them at the rate of five miles an hour, the company were guilty of a high degree of negligence, and of which the fact that signals of alarm were given from the engine employed in the switching, intended for a person crossing the side track, who was injured by the cars, would not excuse him.

And it was gross negligence on the part of the brakeman on the train not to be at the brakes to respond to the signal of "down brakes," given by the engineer, on being there, in failing to put on the brakes. As the company had adopted such dangerous mode of switching, it was imperative that the brakeman should have been so situated as to see in front of his train, and to have had full command of it, so as to have guarded, as far as possible, against inflicting injury.

Contributory and comparative negligence. In an action against a railroad company to recover for the death of a person occasioned by the alleged negligence of the defendants, an instruction which directed the jury, that in case they believed, from the evidence, that both the deceased and the agents and servants of the company were guilty of gross negligence contributing to the injury, they should find for the defendants, was *Held*, to be proper, as embodying a correct legal proposition—that where both parties are guilty of gross negligence, as a general rule, liable, it may be, to some exceptions, the plaintiff cannot recover—and it was error for the court to modify it, no circumstances appearing in the evidence that called for or upon which to base the modification.

Although the deceased in such case was guilty of negligence contributing to the injury, yet, if the defendants were guilty of a higher degree of negligence, with which, when compared, that of the deceased was greatly disproportionate or slight, the plaintiff might still recover. But if the negligence of deceased was equal to that of defendants, a recovery cannot be had. Being the duty of the former to use prudence and care, if he failed to do so, and was guilty of negligence, to authorize a recovery the negligence of the defendants must be clearly and largely in excess.

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Every person of ordinary intelligence is bound to know that a railroad crossing over a public highway, where cars are frequently passing, is a place of more than ordinary danger, and should use, at such place, greater precaution to avoid injury than at a place of less hazard. While all persons have a right to cross a railroad track at its intersection with a public highway, it is their duty to do so with all reasonable despatch, and it would be negligence in an intelligent person to be on the track of a railway constantly used, unless for the purpose of crossing the same.

If a person travel along a railroad track where cars are frequently passing, even for the purpose of crossing a public highway, unless the highway is so obstructed as to render it necessary to follow the railroad track, he is guilty of such negligence as will prevent a recovery for any injury he may receive, unless there is a higher degree of negligence contributing to the injury on the part of the employees of the road.

Damages—death resulting from negligence. In an action under the statute to recover for the death of a person caused by the wrongful act, neglect or default of the defendant, the only question to be determined in estimating the damages, is the pecuniary loss resulting from his death to the widow and next of kin of such deceased person. The feelings of the widow and next of kin, their wealth or poverty, or any other fact than the pecuniary injury, cannot be considered in assessing the damages. The fact that the widow is deformed and disabled can, in no wise, increase or diminish the amount of damages she may be entitled to recover.

Same—in estimating measure of, for pecuniary loss. In such case the support the widow would have been likely to receive from her husband, had he not been killed, is a proper and the controlling element to be considered by the jury in arriving at the measure of compensation for the pecuniary loss sustained.

Appeal from the circuit court of Lee county.

The opinion states the case.

Mr. J. M. Bailey, and Mr. B. C. Cook, for the appellants.

Mr. H. C. Hyde, and Messrs. Eustace, Barge & Dixon, for the appellee.

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BY THE COURT. — WALKER, J. — This suit was brought by the widow, as the administratrix, of Jacob Baches, deceased, against appellants, to recover damages for causing his death. The venue was changed from Stephenson county, where the suit was commenced, to Lee county. At the December term, 1869, a trial was had by a jury, resulting in a verdict for four thousand dollars against appellants, upon which a judgment was rendered, after overruling a motion for a new trial, and the record is brought to this court, and various errors assigned.

It appears that deceased received the injuries complained of and from which he died, about the fourteenth of March, 1869, by being run upon by the cars on appellants' road, under the management and control of their servants, on a turn-out track in the city of Freeport, known as "Manny's switch track." He died of the injuries thus received the same evening, leaving a widow and an infant child surviving him. It appears appellee is administratrix of his estate.

The Manny switch track connects with appellants' main track, and they run nearly parallel from the point of intersection to the south side of Jackson-street, a distance from the point of intersection of two hundred and thirty-eight feet, being but fifteen feet apart from center to center at that point, the course of both tracks from their junction being northwesterly. The switch, after crossing Jackson-street, which is sixty-six feet wide, curves rapidly to the south, and passes up an alley sixteen feet wide, between Jackson and Spring-streets, till it intersects with Adams-street, where it terminates. The switch was built by the citizens of Freeport, but afterwards passed into the hands of Manny & Pattison. It appears from the evidence that this alley was used by the citizens to pass up and down, and that Jackson-street was used for the same purpose, and in crossing from one side to the other.

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On the evening of the injury, deceased, in company with Strata, in coming from their work, on entering the city, and as they were in the act of crossing the main track on the culvert, was stopped by a train going southward, the engine pushing before it two empty platform coal cars. After the engine had passed, deceased and Strata crossed the track, and passing on the Manny track, walked along the same into Jackson-street, as appellee contends, and deceased was there overtaken and killed by the two coal cars, sent thither by what is called a running switch.

Appellants insist, that deceased was on the railroad track south of the street when he was struck, and hence was at a place where he had no right to be, when he received the injury, while appellee insists, that the evidence shows that he was in the street, and where he had an undoubted right to travel, when the injury was inflicted. On this question the evidence is conflicting, and as the case must be passed upon by another jury, we deem it proper that we should not comment upon it, but leave it to be considered by the jury, unbiased by our opinion of its weight.

It appears that after being struck, deceased was dragged by the cars to the north side of the street. The engine driver, who was passing up the main track, on seeing the cars approaching deceased, sounded the whistle for brakes, but the brakeman on the coal cars did not check them up so as to save deceased from the injury.

It is, no doubt, necessary for railroad companies to transfer their cars from one track to another, so as to reach warehouses to receive and discharge freight and to make up trains. There are various modes in use by which such transfers are made, and observation teaches that some are safe, while others are hazardous to life, in cities and thoroughfares. The mode usually employed is to draw or push them by an engine, to which

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they are attached, and being thus constantly and entirely under the control of the engine driver, who has at his command well known signals to give warning of immediate danger, and can almost instantly stop his engine when progressing at a safe rate of speed. This is the most commonly adopted mode, because it is convenient for those operating the road, and when carefully performed is safer to the community. There are other safe modes, but perhaps less convenient and not so expeditious.

The mode adopted in this case is called a "running" or "flying switch." It is performed by attaching the cars to be thrown upon the other track to the engine. The train is then put in motion, running toward the switch, and before it is reached, and when sufficient momentum to answer the purpose has been acquired, the engine is detached, passes on the main track, and after passing, the switch is changed, and the cars thus detached, by the momentum thus acquired, are carried along the side track to the point intended.

It seems, from the evidence in this case, that the cars thrown upon the Manny track had a momentum which carried them at a rate of five miles per hour when they struck deceased.

Was it negligence to thus switch these cars? It was done in a populous part of a city of ten or twelve thousand inhabitants; crossing a traveled street, and along an alley used by the public. To cut loose and send such a dangerous train into a city, across and along public thoroughfares, silent in its approach and dangerous in its force, seems to be a high degree of negligence. It would seem to be fraught with great danger to the lives of citizens. Persons are liable at all times to be on the streets, and have a right to be there, and a right to insist that those using dangerous engines and constructions on the streets, shall observe the degree of care which such a hazard renders necessary

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to secure the safety of persons on such highways, used in common by the public and the corporation.

Whatever theory witnesses may advance, the very nature of things, and the dependence one thing has upon another, render it perfectly apparent that such a mode of switching is, nor can it be otherwise than hazardous, when performed in a populous city, in the manner the evidence shows this to have been done. It was unaccompanied by the controlling power of the engine. Can any one entertain the shadow of a doubt, that had the cars been drawn on the track by the engine, the driver, if at all attentive to his duty, could have checked up the train in time to have saved deceased from injury, had the latter failed to regard the usual signals. It seems to us almost self-evident that he could. Deceased, having seen the engine and cars go down the road, did not, in all probability, suppose the cars had been detached, and it did not occur to him that the signals given by the engine on the other track were intended to warn him of danger, but he probably supposed they were to warn persons on the other track. But had the cars been drawn by the engine, and the signal given behind him, he would almost certainly have heeded it.

It is true, in this case there was a brakeman on these cars, but it appears he was not at the brakes to respond to the signal of "down brakes," given by the engineer. He might as well have been on the engine, or off the cars, for all the benefit resulting from what he did. Had he been at the brake, and had he been obedient to the signal, he might, and probably would, have been able to save the life of deceased. But he was not at his post, or failed in putting on the brakes if he was. In this there seems to have been gross negligence. The brakeman should have been so situated as to see in front of his train, and to have had full command of it, so as to have guarded, as far as pos-

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sible, against inflicting injury. This was imperative, as the company had adopted this dangerous mode of switching.

We now come to the consideration of the instructions given and refused, upon which complaint is made by appellants. It is insisted the court erred in modifying the seventh of appellants' instructions. As asked it was this:

"In case the jury believe, from the evidence, that both the said Jacob Baches and the agents and servants of the defendants were guilty of gross negligence, contributing to the injury of which said Jacob Baches died, the jury are instructed to find their verdict for the defendants."

The majority of the court hold this instruction, as asked, to be proper, as embodying a correct legal proposition, that when both parties are guilty of gross negligence, as a general rule, liable, it may be, to some exceptions, the plaintiff cannot recover. It was, therefore, improper to modify it. No circumstances appear in the evidence that called for or upon which to base the modification.

It is next urged, that the court erred in refusing to give appellant's eleventh instruction, which is this:

"Every person of ordinary intelligence is bound to know that a crossing of railroad track over a public highway, when cars are frequently passing, is a place of more than ordinary danger, and it becomes his legal duty at such place to use corresponding care and caution to avoid injury; and while it is true that the public have a right to be upon a railroad track, at the crossing of a public highway, for the purpose of crossing over such track, it is the duty of all persons crossing over such track to do so with all convenient despatch; and if the jury believe, from the evidence, that in this case the deceased, Jacob Baches, was upon the track of the defendants' railroad, not for the purpose

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of crossing over the same, but for the purpose of employing the same as a foot path from his place of labor to his residence, it was negligence on his part to employ such railroad track for such a purpose, even though the jury should believe, from the evidence, that at the time he was so injured by defendants' cars, he had actually proceeded to, and arrived at, a point within the boundaries of a public highway."

No objection is perceived to this instruction. It is evident that a place where a railway crosses a common highway is of more than ordinary danger, when cars are frequently crossing at that point; and it is evident that all persons of ordinary intelligence should use greater precautions to avoid danger, than at a place of less hazard. While all persons have a right to cross the railroad track at the intersection of the two ways, it is the duty of such persons to do so with all reasonable despatch, and it would be negligence in an intelligent person to be on the track of a railroad constantly used, unless for the purpose of crossing the same. These principles are fairly and clearly announced by this instruction, and it should have been given.

The next instruction asked by appellants, and refused by the court, was the nineteenth, and is this:

"Although the plaintiff's intestate had a legal right to walk across the railroad track of the defendants, where the same crosses a public highway, still, if the jury believe, from the evidence, that at the time of his receiving the injury of which he died, he went upon said track outside of the boundary of any public highway, and walked along said track to such highway, and thereupon continued to walk along and upon said track within the boundary of such highway, with the intention of continuing to walk along and upon said track, across said highway, to and along the said track without and beyond the boundary of such highway, and that such highway was unobstructed on either side

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of said track, so that he might have crossed said highway as well without walking upon said track, such facts are evidence for the jury to consider, and from which they may find that said intestate was guilty of negligence in attempting to cross said highway, upon and along said track; and if the jury further find, from the evidence, such negligence on the part of said Jacob Baches, and that, by means of such negligence, he was run against by a car of the defendants, and thereby received the injury of which he died, the jury should find for the defendants, unless they believe, from the evidence, that defendants' servants or employees were, at the same time, guilty of gross negligence, in comparison to which the negligence of said Jacob Baches was but slight, and that such gross negligence also caused such injury."

No material objection is perceived to this instruction. It correctly states that it is negligence to travel along a railroad track where cars are frequently passing, even in crossing a highway, unless the highway is so obstructed as to render it necessary to follow the railroad track, and that it is such negligence as will prevent a recovery, unless there is a higher degree of negligence on the part of the employees of the road.

Appellants asked, and the court refused to give, this instruction:

"The pecuniary circumstances of the plaintiff and her infant daughter, at the time of and since the death of said Jacob Baches, cannot increase or diminish the amount of damages which the plaintiff is entitled to recover in this suit, in case the jury find the issue for her, and if the jury so find, they are instructed, in the assessment of damages, to disregard all the testimony as to the pecuniary circumstances of said plaintiff and her infant daughter, at the time of and since the death of said Jacob Baches."

This instruction should have been given. The object

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of the act under which this action is brought, is to give compensation for the pecuniary loss sustained by the widow and next of kin. The law expressly declares that the "jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of \$5,000." The language of this enactment limits the damages to the pecuniary loss. All other injuries and losses are excluded by the language employed. The action is of statutory creation, and it must be governed and controlled by the statute. This is the construction given to this law, and it cannot fairly receive any other. The feelings of the widow and next of kin, their wealth or poverty, or any other fact than the pecuniary injury, cannot be considered in assessing the damages.

The twenty-seventh of appellants' instructions was refused. It is this:

"If the jury believe, from the evidence, that the plaintiff, at the time of the death of said Jacob Baches, had a deformity of her left hand, partially impairing the use of said hand, and that such deformity had existed from the time of her birth, such fact cannot increase or diminish the amount of damages which she will be entitled to recover in this suit, in case the jury find the issue for her, and if the jury should find the issue for the plaintiff, they are instructed, in the assessment of damages, to disregard all the testimony in the case as to such deformity."

This instruction was proper, and should have been given by the court. It, like the preceding instruction, properly excluded an improper element from the consideration of the jury in assessing damages. The only question for the jury is the pecuniary injury sustained by the death of the deceased, and that cannot, in the remotest degree, depend upon whether the widow is

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disabled. She may not, for that reason, be able to earn as much as if she were not disabled, but appellants are in nowise liable for her misfortune, and are not bound to contribute to relieve her from the consequences of that disability. They did not produce it, and are not liable to relieve her against the results it may produce. How she has lost more money by being crippled than if she had not been, by the death of her husband, is not, to our minds, in anywise apparent. The question is, how much has she lost in a pecuniary view, and the jury should be required to assess damages, in this class of cases, alone on that basis. The court erred in refusing this instruction, as there was evidence before the jury calculated to mislead them in assessing damages.

The seventh of appellee's instructions is not accurate, as it nowhere limits or defines the duty of deceased. Under this instruction, the jury were required to find for the plaintiff, although deceased might have been guilty of negligence equal to that of appellants. Such has never been recognized as the rule of law in this class of cases. This court refused to follow those authorities which hold, that if a plaintiff is guilty of any negligence which contributes to the injury, he could not recover, but announced the rule, that although he might be guilty of negligence, still, if the defendant was guilty of a higher degree of negligence, which, when compared with that of the plaintiff, that of the latter was greatly disproportioned or slight, he still might recover. But we are not inclined to extend the rule, as there is no warrant in the common law for allowing the plaintiff any greater latitude. He should use prudence and care, but failing to do so, and is guilty of negligence, he can not recover, unless the negligence of the defendant clearly and largely exceeds his. This instruction should have been refused, or modified so as to announce the rule of comparative negligence before it was given.

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It is urged, that the first of appellee's instructions is erroneous, in permitting the jury to take into consideration the support the widow and minor would have been likely to receive had deceased not been killed. That is a fair, and, no doubt, the controlling element to be considered in fixing the pecuniary loss sustained. It is the loss of that support which more largely produces the pecuniary injury than any other, and hence it is eminently proper that it should be considered. The law imposes upon the husband the duty of supporting the wife, and hence, by his death, she sustains a pecuniary loss, and that being so, it is a proper element to be considered by the jury in assessing damages. But, for the errors indicated, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

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ABANDONMENT.

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ACTION.

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APPEAL.

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BAGGAGE.

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CARRIERS.

1. When goods are delivered for carriage to a railroad company the law implies a contract that they shall be safely, and within a reasonable time, transported and delivered at their destination. And nothing will relieve the company from liability for not complying with this contract save an intervening "act of God, the public enemy, or the act of the owner," or a special contract limiting their common-law liability. *Vicksburg & Meridian R. R. Co. v. Ragdale*, 407.
2. The law does not attempt to fix what shall be considered a reasonable time by a common rule. It must depend in each case upon the attendant circumstances. *Ib.*
3. If a railroad company, acting as a common carrier for hire, has a reasonable equipment for transportation of goods for ordinary purposes, and delay be caused by unusual press of business, or by an accident not amounting to an inevitable casualty, the company will not be liable for damages caused by the delay, if they have acted with reasonable expedition, care, and prudence, under the circumstances. And a company is not bound to incur extraordinary expenses to procure means to forward freights, if they are fully supplied with means for forwarding them under ordinary circumstances, and the occurrences which render those facilities temporarily insufficient could not have been foreseen at the time the contract for carrying was made. *Ib.*

CARRIERS—Continued.

4. A railroad company, like an individual, will be held responsible for such damages as may be the natural result of its act. If other damages are claimed for its act, special grounds for their allowance must be shown. *Ib.*
5. In a suit against a railroad company for delay in delivery of goods intrusted to it for transportation, the plaintiff cannot be allowed to recover simply speculative damages. *Ib.*
6. In such a case it was the duty of the plaintiff to have taken all reasonable means to lessen the amount of the damages sustained, and in like measure the burden attempted to be imposed upon the company. *Ib.*
7. The obligations and liabilities of a railroad company as a common carrier are imposed by law and not created, though they may be sometimes modified, by contract. *Hannibal R. R. Co. v. Swift*, 434.
8. It is the duty of a railroad company, as a common carrier of passengers and merchandise, to receive for transportation over its route, or any portion of it, all persons and their baggage, or merchandise, for the transportation of which application shall be made, unless some reasonable grounds for refusing to receive the same exist, and the company will be responsible for their safe conveyance to their destination or the terminus of the route. *Ib.*
9. If any reasonable grounds should exist at the time of the application for transportation for refusing to receive and carry the passengers or merchandise, the company is bound to insist upon such grounds at the time, if desirous of avoiding responsibility. *Ib.*
10. If, having reasonable grounds for refusing, it neglects to insist upon them at the time, and receives the passengers and their baggage, or merchandise, knowing, or having free opportunity to know, the character and amount of the latter, it becomes responsible for their safe conveyance as if no objection to their acceptance had been originally possible. *Ib.*
11. The liability of the company in such a case is not affected by the fact that the baggage, or merchandise, was placed in a car selected by or for the owner of the goods by his own servants, and the company received the car packed and locked. Their liability arises from the fact that they did receive it. If they were not certain of its being securely freighted, they could, or should have learned then, or objected to taking it on that account. *Ib.*
12. *Semble*, it would make no difference if a car so selected, passed, and delivered to the company, was placed under guard of the

CARRIERS—Continued.

- passenger's servants, so long as the management of the train or car by the company's employees was not impeded. *Ib.*
18. The surgical instruments of an army surgeon are properly included as baggage when he is traveling with the troops. *Ib.*
 14. In the absence of special contract, the obligation of a carrier of goods is to transport them by the usual route proposed by him to the public, and to deliver them within a reasonable time, whether by the route of his own carriage or extended to points beyond. *Empire Transportation Co. v. Wallace*, 448.
 15. He must use reasonable expedition, but is not bound to use extraordinary exertions or extra expense to surmount obstacles not caused by his own default, but by the weather, or other act of providence. *Ib.*
 16. The established route of a carrier was by rail to Philadelphia, and by water to Boston. He was not bound to send goods by rail from Philadelphia when there was an obstruction in the water communication. *Ib.*
 17. The law implies an agreement on the part of a railroad company, when no express contract is made, to transport merchandise entrusted to it as a common carrier, within a reasonable time. *Ward v. New York Central R. R. Co.*, 452.
 18. The company negligently omits to do so, and the market value of the merchandise falls. The difference in its value at the time and place when and where it should have been delivered, and at the time of its actual delivery, will be the measure of the damages which may be recovered. *Ib.*
 19. In an action to recover damages of a railroad company for injury to a lot of flour during its transportation, the evidence of a witness who only saw a part of the flour examined at the place of destination, is admissible on behalf of plaintiff. The objection that the witness only saw a *part* of the flour examined, does not go to his competency. *Winne v. Illinois Central R. R. Co.*, 460.
 20. In all cases of loss or injury to property intrusted to a common carrier for transportation, the burden of proof is on him to show that the loss was occasioned by the act of God or the public enemies. Proof of the delivery of the goods and their loss or injury while in the carrier's hands, makes out a *prima facie* case for the plaintiff. *Ib.*
 21. The application of the general rule that, in this class of actions, the measure of damages is the difference between the market value of the goods as delivered and what their value would have been if they had not been damaged in the course of transportation, is not always just and proper. *Ib.*

CARRIERS—Continued.

22. It was accordingly *Held*, in an action against a railroad company for damages to a lot of flour, that the plaintiff might show and recover what it cost to put the flour in a salable condition after its arrival at the place of consignment, it appearing that such expenditure was beneficial to the defendant by reducing the damages which it otherwise would have sustained under the operation of the general rule above referred to. *Id.*
23. Where goods are delivered to a common carrier to be transported, a promise to pay freights will be implied, and it is not necessary to prove payment or tender of the charges in order to hold him liable in his capacity of common carrier. The law will not presume that the bailment was gratuitous. *Id.*
24. The defendant, a railway company, undertook to transport for the plaintiffs a quantity of cattle from G. to B., under a contract containing, among others, the following stipulations: "1st. That the owners of the cattle undertake all risks of loss, injury, damage and other contingencies in loading, unloading, conveyance and otherwise. 2nd. The company do not undertake to forward the animals by any particular train, or at any specified hour; neither are they responsible for the delivery of the animals within any certain time, or for any particular market." The cattle were transported part of the distance agreed, and the cars containing them detached from the train and left on a side track, where they remained, some two, the others three days. The usual time for transporting cattle between G. and B. was from eighteen to twenty hours. While the cattle remained on the side track, the weather was very cold. From exposure to the weather, and from the want of food and water, which could not be supplied to them while there, some of the cattle died and the others were seriously injured. *Held*, that the company was liable for a breach of the contract; its action constituting not merely negligence in the performance of the contract, but an entire and intentional abandonment of all effort to perform it for the time. *Keeney v. Grand Trunk Railway of Canada*, 466.
25. In the absence of a special contract to that end or an established and well-known usage, a railroad company is not bound to deliver goods beyond its regular depot, or give notice of their arrival to the consignee. *New Orleans, Jackson & Great Northern R. R. Co. v. Tyson*, 474.
26. Where it is shown to be the well recognized custom of the company to give the consignee notice of the arrival of goods, it would be liable for such loss as might occur from failure to give such a notice. *Id.*

CARRIERS—Continued.

27. The measure of damages in such a case would be the difference between the market value of the goods at the time when notice should have been given, and when it actually was given, or the fact of the arrival came to the knowledge of the consignee. *Id.*
28. The consignee in such a case can not increase the liability of the company by refusing to receive goods because of delay or failure to give a customary notice, and a suit lies, not for non-delivery of the goods, but for the neglect to notify. *Id.*
29. A railroad company cannot be compelled, as common carriers, to receive goods at stations along their line for transportation, on the requirement of the consignor that they shall, themselves, deliver the goods at a point beyond or off their own line of road, or to deliver goods received by them for transportation, at such point. The legal duty of the company in that regard is commensurate only with their franchise; it is confined to their own line of road, and cannot be made to extend beyond it. *People ex rel. Hempstead v. Chicago & Alton R. Co.*, 480.
30. Nor can a railroad company, chartered with certain express powers and privileges, with certain *termini* within which they are to be exercised, be compelled to purchase, for the accommodation of the public, more extended privileges beyond the limits of their franchise, so that they may deliver goods at points not upon the line of their road, or within its established *termini*. *Id.*
31. So where it was sought to compel a railroad company to receive a quantity of grain at one of their stations, to be transported and delivered at a certain grain elevator in the city of Chicago, it appeared such elevator was situated upon a side or switch track which connected with the road of the company in that city, but was beyond its actual *terminus*. The side or switch track was constructed, owned and controlled by other companies, with whom the company against whom the remedy was sought, had no arrangement for its use, except as might be specially agreed upon in particular instances, though, under an ordinance of the city, that company could have compelled an arrangement for its regular and permanent use. *Held*, the company could not be compelled to receive the grain to be delivered at such elevator beyond the *terminus* of their own road, nor could they be compelled to acquire the right to use the switch track leading from their road to the elevator for the purpose of such delivery. *Id.*
32. Nor would the rights of parties in that regard be affected by

CARRIERS—Continued.

- the fact that such company had previously, in repeated instances, delivered freight at that elevator, by the use of such switch track running thereto, but by virtue of special agreement to that effect. *Id.*
83. In order to compel a railroad company to deliver grain, shipped on their road in bulk, at a particular elevator to which it may be consigned, it is indispensable such elevator must be connected by some track with the railroad line of the company, and be, in fact, a portion thereof, or such as would be regarded a portion thereof, for the purpose of such delivery, under the act of 1867, entitled, "Warehousemen." *Id.*
84. Railroad companies cannot disregard the custom which has obtained, of conveying grain in bulk over the lines of their own roads, and delivering it at any elevator thereon to which it may be consigned. If consigned to an elevator or warehouse not on their road, and beyond their *terminus*, or if there be no elevator on the road on which the grain is carried, then they may rightfully refuse to receive it in bulk. *Id.*
85. Mr. Justice SHELDON holds, that so long as a railroad company actually makes use of the track of another company, leading from their own road to an elevator, in running their cars, it is their duty to deliver grain there, under the rule in Vincent's case, 49 Ill. 88. *Id.*
86. Mr. Justice SCOTT is of opinion, it was the duty of the company in this case to receive the grain and to deliver it to the elevator designated, but that the remedy is not by mandamus, there being another complete remedy. *Id.*
87. Mr. Justice WALKER holds, that mandamus is the proper remedy to compel a railroad company, when it is their duty to do so, to carry grain in bulk and deliver to the elevator to which it is consigned; also, that when a road enters the city of Chicago, the company should deliver grain there at any elevator to which it may be consigned, either upon their own road, or upon the road of any other company with which they have running arrangements, unless in so doing they would incur unreasonable expense; but that a company cannot be compelled to contract or acquire facilities for such delivery beyond their own line. *Id.*
88. A common carrier may bind himself to transport goods beyond his own route and thus become responsible for the default of those he employs to carry the remainder of the distance; but the proof of the contract should be clear, especially when it would contradict the papers accompanying the transaction. *Pennsylvania R. R. Co. v. Berry*, 501.

CARRIERS—Continued.

39. A railroad company receiving goods consigned to a place off its line, and agreeing to forward them by a particular line from its terminus to their destination, will be liable to the consignor for the increased freight charges, if it forwards them by another and more expensive line. *Proctor v. Eastern R. R. Co.*, 511.
40. Transportation by a common carrier is open to the public upon equal and reasonable terms. *Audenried v. Philadelphia & Reading R. R. Co.*, 515.
41. An exclusive right granted to a common carrier only, is inconsistent with the rights of all others. *Id.*
42. Whatever rules tend to the comfort, order and safety of the passengers on a railroad, the company are authorized to make and to enforce. But such rules must always be reasonable, and uniform in respect to persons. *Chicago & Northwestern R. Co. v. Williams*, 581.
43. A rule setting apart a car for the exclusive use of ladies, and gentlemen accompanied by ladies, is a reasonable rule, and it may be enforced. *Id.*
44. The mere fact that, under the rules and regulations of the company, a certain car in their passenger train has been designated for the exclusive use of ladies, and gentlemen accompanied by ladies, will not justify the exclusion of a colored woman from the privileges of such car, upon no other ground than that of her color. *Id.*
45. Under some circumstances it might not be an unreasonable rule to require colored persons to occupy separate seats in a car furnished by the company, equally as comfortable and safe as those furnished for other passengers. But in the absence of any reasonable rule on the subject, the company cannot lawfully, from caprice, wantonness or prejudice, exclude a colored woman from the ladies' car, merely on account of her color. *Id.*
46. Where a person seeking passage in a particular car in a railroad train is wrongfully and wantonly excluded therefrom, he may recover, in addition to the actual damages, something for the indignity, vexation and disgrace to which he was subjected by reason thereof. *Id.*
47. So, where a colored woman was refused admittance to a ladies' car, solely on account of her color, and was directed to take a seat in another car, which was set apart for and mostly occupied by men, but which she declined to do, insisting upon her right to be admitted to the ladies' car, and the evidence justifying the conclusion that the brakeman, in excluding her from that car, did so in a very rude manner, and in the presence of

CARRIERS—Continued.

- several persons, it was *Held*, a verdict of two hundred dollars recovered by the woman against the company was not excessive. *Id.*
48. The conductor on a street car was instructed by the company to collect a certain fare from each passenger, and to remove any one refusing to pay the fare. *Held*, if the company has no right to collect the fare, it is liable for any degree of force employed to remove a passenger. If it has a right to collect the fare it is nevertheless liable if the conductor, in removing the passenger, exceeds the degree of force necessary and proper for the purpose, and injury results. *Jackson v. Second Ave. R. R. Co.*, 588.
 49. The question whether the act from which the injury followed was animated by malice or misconception of the necessary force to be used, is for the jury. *Id.*
 50. The plaintiff, twelve years of age, while traveling with his mother upon the cars of the defendant, having surrendered his seat to a lady, went into another car, with his mother's permission, in search of a seat, which could not be found in the car where he was. In endeavoring to return after the train had stopped at a station, he was thrown under the cars by a sudden starting of the train, and seriously injured. *Held*, that the mother's permitting him to pass alone from one car to another was not, under the circumstances, a negligent act. *Downs v. New York Central R. R. Co.*, 543.
 51. Defendant offered in evidence a newspaper account of the injury to plaintiff for which suit was brought; such account having been prepared from statements made to the writer by the plaintiff and others on the day and at the place of the accident. *Held*, that as this was not an original memorandum of the plaintiff's statements or a correct copy of such a memorandum by the author, it was not competent evidence of such statements. *Id.*
 52. Statements by the plaintiff in an action for injuries received upon a railroad train, relative to the circumstances of the injury, having been given in evidence by the defendant,—*Held*, that other and independent declarations by him upon the same subject, at nearly the same time, but not part of the same conversation, were not admissible on behalf of the plaintiff. *Id.*
 53. Whether, in an action to recover damages sustained by reason of the negligence of the defendant, it is necessary to aver that the injury was occasioned "without the fault of the plaintiff,"—*Query?* But if the omission be a defect, it cannot be taken advantage of after verdict, and in a reviewing court, for the first time. *Union Pacific R. Co. v. Hand*, 548.

CARRIERS—Continued.

54. Testimony though somewhat remote is still legitimate if it tends to maintain the issues in the case. *Ib.*
55. Where the petition alleges the cause of plaintiff's injury to arise from a defective track, a defect in the track anywhere may be shown, if it contributed to the injury. *Ib.*
56. Railroad companies are required to use the utmost human sagacity and foresight in the construction of roads, to prevent accidents to passengers. *Ib.*
57. Where the amount of damages assessed in a verdict shows that the jury was influenced by passion and prejudice, it is the duty of the court to order a new trial of the case. *Ib.*

CATTLE.

For construction of contract to transport cattle, see **CARRIERS**, 24.

CHANCERY.

See **EQUITY**.

CONNECTING LINES.

As to forwarding goods by other lines, see **CARRIERS**, 16, 29, 30, 38, 39.

CONSTITUTIONAL LAW.

For rules of construction of constitutional provisions, see **LANDS**, 3, 17; **MUNICIPAL CORPORATIONS**, 8, 11, 22-27, 33; **STATUTES**, 1; **TAXES**, 2, 4.

CONTRACTS.

1. The Northern Railroad brought a bill in equity against the Concord Railroad to enforce a contract made by a former board of directors of the Concord Railroad, substantially transferring the management of the Concord Railroad to the Northern Railroad for the term of five years. Upon the evidence a majority of the court found that the controlling purpose of the directors of the Concord Railroad, in making the contract, was to prevent the management of the road from passing into the hands of a new board of directors, whose election at the next annual meeting was generally anticipated; and that this purpose was known to the Northern Railroad. On this state of facts a majority of the court *Held*, that the contract was invalid because of the purpose for which it was made. *Northern R. R. v. Concord R. R.*, 164.
2. In this case it was *Held* by **SARGENT, J.**, and **SMITH, J.**, that there was not such reason to apprehend a perversion of the trust by the newly elected directors of the Concord Railroad

CONTRACTS—Continued.

as would justify the court in withholding from them the control of any portion of the corporate affairs, except certain pending suits which the new board had already been expressly enjoined from controlling. *Id.*

As to the nature of contracts for the carriage of goods, see **CARRIERS**, 1, 7, 14, 17, 23-25, 38.

COSTS.

As to costs on mandamus, see **MUNICIPAL CORPORATIONS**, 14.

COUNTIES.

As to the power of counties to subscribe for railroad stock, see **MUNICIPAL CORPORATIONS**, 17-38.

DAMAGES.

1. A railroad company, like an individual, will be held responsible for such damages as may be the natural result of its act. If other damages are claimed for its act, special grounds for their allowance must be shown. *Vicksburgh & Meridian R. R. Co. v. Ragadule*, 407.

2. Corporations are not liable to more than compensatory damages, unless the injury is wanton or willful. *Chicago & Northwestern R. Co. v. Jackson*, 569.

As to damages for private property taken for railroad purposes, see **LANDS**, 2, 18, 27.

For injury to or loss of goods carried by railroad, see **CARRIERS**, 4-6, 18, 21, 22, 27.

For expulsion of passengers from the cars, or injury to passengers, see **CARRIERS**, 46-48, 57.

For injuries to employees of railway companies, from negligence of the companies or of fellow servants, see **MASTER AND SERVANT**, 7-10.

For injuries to travelers crossing railway track, see **NEGLIGENCE**, 7, 8.

DELIVERY.

As to the obligation to deliver goods transported by railroad, see **CARRIERS**, 5, 25-37.

DIRECTORS.

As to powers of directors of railway companies, see **CONTRACTS**.

DISSOLUTION.

As to when a mortgage sale of corporate franchises and property works a dissolution, see **MORTGAGES**, 12-14.

DIVIDENDS.

As to who is entitled to a dividend, on distributing proceeds of a mortgage sale, see **MORTGAGES**, 11.

As to "interest dividends" on stock, see **STOCK**, 1-8.

EMINENT DOMAIN.

As to the right to take lands of private individuals for railroad purposes, see **LANDS**, 7, 17.

EQUITY.

As to when equitable relief will be granted for want of an adequate remedy at law, see **STOCK**, 7-10.

As to bill in equity to redeem a pledge, see **PLEDGE**.

EVIDENCE.

1. Testimony, though somewhat remote, is still legitimate if it tends to maintain the issues in the case. *Union Pacific R. Co. v. Hand*, 548.

2. Defendant offered in evidence a newspaper account of the injury to plaintiff for which suit was brought, such account having been prepared from statements made to the writer by the plaintiff and others on the day and at the place of the accident. *Held*, that as this was not an original memorandum of the plaintiff's statement, or a correct copy of such a memorandum by the author, it was not competent evidence of such statements. *Downs v. New York Central R. R. Co.*, 542.

3. In a suit for damages against a railroad company for killing plaintiff's husband, proof of a letter from the president to the plaintiff, containing an offer of money as a charitable donation, but in no way admitting any legal liability, although strictly improper for irrelevancy, would not be calculated to work harm to defendant, and would not justify a reversal of the cause. *Gavisk v. Pacific R. R. Co.*, 581.

As to what evidence is admissible in actions for injury to goods, see **CARRIERS**, 19.

As to when declarations of a party are admissible, see **PENALTIES**, 6.

As to when the opinion of a witness is competent, see **WITNESSES**, 2.

FIXTURES.

As to fixtures upon premises taken for railway purposes, see **MORTGAGES**, 1, 2.

FORECLOSURE.

As to the effect of foreclosure of mortgages upon bonds secured thereby, see **BONDS**; **MORTGAGES**, 7-11.

FORECLOSURE—Continued.

As to distribution of proceeds of foreclosure sale, see **MORTGAGES**, 6.

FREIGHT.

As to when a promise to pay freight is implied, see **CARRIERS**, 28.

HIGHWAYS.

The owner of a lot bounded by the public street, in a recorded town or village plat, takes to the center of the street, subject to the public easement. *Hegar v. Chicago & Northwestern R. Co.*, 85.

As to acquiring title, for railroad purposes, to land used as a highway, see **LANDS**, 1-4.

As to the right to establish streets crossing railroads, see **MUNICIPAL CORPORATIONS**, 8.

As to injuries to travelers on a highway crossing a railroad, see **NEGLIGENCE**.

INCORPORATION.

1. When a company was incorporated in the State of Maryland with a view of laying and operating a railroad beyond the limits of that State, in Virginia, and afterwards extended a lateral road into the District of Columbia, to authorize which extensions beyond the State line in the first case an act of the legislature of Virginia was obtained re-enacting the Maryland charter, and in the second case an act of Congress allowing the company to extend its road into the District of Columbia,—*Held*, 1. That these separate enactments did not create distinct corporations, the corporate name, mode of business, powers and duties of officers being the same in all localities.
2. That suit might be maintained in the courts of the District of Columbia for personal injuries received by a passenger on the road in Virginia.
3. That the right of the plaintiff in such case to maintain his action against the company in the District of Columbia was not affected by an announcement made upon the ticket received by him, that responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone. *Baltimore and Ohio R. R. Co. v. Harris*, 559.

See also **JURISDICTION**.

INFANTS.

As to what constitutes negligence on the part of one in charge of a child, see **CARRIERS**, 50.

INJUNCTION.

1. The object of a preliminary injunction is simply preventive, to maintain things as they are until the rights of the parties can be considered and determined after a full hearing. *Audenried v. Philadelphia & Reading R. R. Co.*, 515.
2. A preliminary injunction is never awarded except when the equity of the complainant is clear, supposing the facts of which he gives *prima facie* evidence to be ultimately established. *Id.*
3. All injunctions are for restraint, yet final injunctions may go beyond this and command acts to be done or undone; they then are termed mandatory. *Id.*
4. A tribunal which finds itself unable directly to decree a thing should not attempt to accomplish it by indirection. *Id.*
5. It is very unusual to take testimony by an examiner on a motion for preliminary injunction. *Id.*

As to when an injunction will be granted to restrain collection of taxes, see **TAXES**, 7-9.

INTEREST.

As to "interest dividends" on stock, see **STOCK**, 1-6.

JOINDER.

As to joinder of actions, see **ACTION**.

JUDGMENT.

In equity, upon a hearing on the merits, the court were equally divided on the question whether the bill should be dismissed. *Held*, that no judgment could be entered, that the cause remained pending, and that receivers, who had been appointed to hold the property during the pendency of the suit, would remain in possession. *Northern R. R. v. Concord R. R.*, 164.

As to the effect, upon the lien of a judgment, of proceedings to acquire lands of the judgment debtor for railroad purposes, see **LANDS**, 16, 17.

JURISDICTION.

The defendant corporation exists and is operating its railroad under and by virtue of acts of the legislature of Vermont and Massachusetts respectively. Its railroad is located wholly within the two States, being partly in each. Therefore, the courts of Vermont as well as the courts of Massachusetts have jurisdiction of this corporation. *Richardson v. Vermont & Massachusetts R. R. Co.*, 115.

See also **INCORPORATION**.

JURY.

What questions are proper for the jury, see **CARRIERS**, 49.

As to the qualifications, mode of summoning, and form of report of the jury in proceedings to acquire land for railroad purposes, see **LANDS**, 2-8, 10, 18.

As to irregularities of the jurors, see **TRIAL**.

LANDS.

1. A petition by a railroad company to acquire title, for railroad purposes, to lands used and occupied as a street, which does not disclose whether said lands are designed to be appropriated as the property of the respondent, or whether they were included in the petition for the purpose of having an assessment of the respondent's damages by reason of his ownership of premises fronting on the street, is fatally defective. *Mansfield, Coldwater & Lake Michigan R. R. Co. v. Clark*, 1.
2. An award of a jury in such case, which disclosed that the jury assessed the damages which they thought the respondent entitled to on account of his "claiming" to own certain land, used and occupied as a street, without determining whether in fact he did own it, and from which it does not appear whether the damages awarded were the estimated value of the land or only that of some doubtful claim they supposed him to be setting up, cannot be sustained. *Id.*
3. A finding in the verdict of a jury in such a case that "it is necessary that said real estate and property should be taken for purposes of said company," is not such a finding of the necessity for the taking of said property for the public use, either in form or substance, as is required by the constitution. *Article XVIII. § 2. Id.*
4. The report of the jury or commissioners, in such cases, must distinctly find that the taking is necessary for the public use and benefit; and to make such a report they must be satisfied not only that the particular land is needed for the construction of the work, but also that the work itself is one of public importance. *Id.*
5. When the claimant was present at the impanneling of the jury, and no challenge was interposed, the objection to the confirmation of the report of the jury, that the jurors are not affirmatively shown to be freeholders, in the absence of any showing that any of them were disqualified, is not well taken. *Id.*
6. The proper course, when a jury is required of persons possessing a particular qualification, is for the order of the court to direct the summoning of such persons. *Id.*
7. The Hannibal & St. Joseph R. R. Co. are authorized under the

LANDS—Continued.

statute (*Wagn. Stat.* 298, § 2, subd. 7) and charter (§ 5), to condemn land for purposes of depots, engine houses and repair shops. Such use is a public use, for which property may be taken against the owner's consent. *Hanibal & St. Joseph R. R. Co. v. Muder*, 8.

8. In proceedings to condemn land for railroad purposes, an allegation in the petition that the parties could not agree upon the proper compensation to be paid for the land proposed to be taken, is a sufficient averment of the fact of disagreement to put the adverse party upon his defense on the merits. *Id.*
9. Where proceedings of commissioners appointed to assess damages for taking of railroad lands are regular, and there is nothing to show that they erred in the principles upon which their valuation was made, exceptions to the proceedings should be overruled. *Id.*
10. The verdict of a jury of inquest, under the general railroad law, must be unanimous, and a verdict signed by less than all is a nullity. *Chicago & Michigan Lake Shore R. R. Co. v. Sandford*, 10.
11. Under the statute, as amended, the petition need not show an intention to build the entire road, if a division of fifteen miles has been lawfully designated; but in such a case it must appear in the petition affirmatively that such division has been lawfully made in such a manner as to conform to the statute. *Id.*
12. When the land of several persons is sought to be appropriated, each parcel must be distinctly described, and the purpose for which it is wanted, and reasons why it is necessary to proceed under the statute to take it must be given. Parcels may not all be needed for the same purpose, and the same reasons for proceeding adversely may not exist in all cases. *Id.*
13. The fact of inability to agree with the owner is jurisdictional, and may be controverted like any other fact. *Id.*
14. Each owner has a right to have a finding as to the value of his land and the necessity of taking it; and a general finding, giving a single sum for taking the land of several owners, is invalid. *Id.*
15. A petition not distinguishing the land of several owners, nor showing the cause of proceeding against each, is too defective to maintain proceedings, and when a verdict under it is set aside, the case cannot be referred back to a new jury, but the parties must proceed by a new application. *Id.*
16. A judgment creditor is not an *owner* within the purview of the statutes allowing condemnation of lands for public purposes upon compensation awarded. He has simply a lien for collec-

LANDS—Continued.

- tion of his debt, subject, at any time before rights become vested by sale, to be cut off by act of the same power, the legislature, which created his right to the lien. *Watkins v. New York Central R. R. Co.*, 22.
17. In the exercise of the right of eminent domain there can be no doubt of the validity of a legislative provision causing the lien of a judgment not ripened into title by a sale, to be superseded by proceeding for condemnation of lands for railway purposes, on payment of compensation to the owner. *Ib.*
 18. In Massachusetts, under Gen. Stat. ch. 43, § 28, providing for summoning a jury to assess damages for private lands taken for public purposes, the "three nearest towns" refers to the proximity of these towns to the town in which the land lies, without regard to the location of the land within the town. *Reed v. Hanover Branch R. R. Co.*, 82.
 19. Partners may recover damages jointly for lands taken for public purposes which were held by one partner in trust for the firm. *Ib.*
 20. A party whose lands are taken by a railroad corporation is entitled to the damages assessed as of the time the lands were taken, with interest to time of assessment. *Ib.*
 21. When a railroad so occupied a street with its road-bed and ditches as to destroy the usefulness of that half of it next the lot owner, as a street,—*Held*, that the railroad must be considered as having taken the whole of the half street, though several feet of it were not actually occupied. *Hegar v. Chicago & Northwestern R. Co.*, 85.
 22. In such case the plaintiff would be entitled to show the value to him of the whole of the half street, as a street, and to recover therefor. *Ib.*
 23. A release of all damages on account of the laying out or construction of a railroad through and over the land of the releasor, does not cover damages occasioned to the remaining land of the releasor by the construction of the railroad over the land of other persons. *Eaton v. Boston, Concord & Montreal R. R.*, 44.
 24. The statutes in force from 1849 to 1851, providing for the assessment of the damages of a land owner whose land was crossed by a railroad, did not authorize the assessors to include the damage which was or might be occasioned to such land owner by the construction of the railroad over the land of other persons. *Ib.*
 25. A railroad corporation, claiming to act under legislative authority, removed a natural barrier situated north of E.'s land,

LANDS—Continued.

which theretofore had completely protected E.'s meadow from the effects of floods and freshets in a neighboring river. In consequence of this removal, the waters of the river, in times of floods and freshets, sometimes flowed on to E.'s land, carrying sand, gravel, and stones thereon. *Held*, that this was a taking of E.'s property, within the meaning of the constitutional prohibition; and that the legislature could not authorize the infliction of such an injury without making provision for compensation. *Id.*

26. A railroad corporation constructed their road across the farm of E. Damages were assessed under the statute, and paid to E. E. released the corporation from damages on account of the laying out of the road over his land. Northerly of E.'s farm there was a ridge of land completely protecting the farm from the effect of floods and freshets in a neighboring river. Through this ridge, the corporation, in constructing their road, made a deep cut, through which the waters of the river in floods and freshets sometimes flowed, carrying, on one occasion, sand, gravel, and stones upon E.'s farm. *Held*, that even if the corporation had constructed their road at said cut with due care and prudence, E. could recover, in an action on the case, such damages as had been caused him in consequence of the corporation's cutting away the ridge north of E.'s farm, and thereby letting the river, in times of freshet, run through this cut and damage E.'s land. *Id.*
27. A. owned the farm between E.'s farm and said ridge. The ridge was about twenty feet wide upon the top, and a small part of it in width was included in A.'s farm, the northerly line of his farm being near the southerly edge of the top of the ridge. In all other respects A.'s case was similar to E.'s. *Held*, that even if the corporation had constructed their road at the cut with due care and prudence, A. could recover, in an action on the case, such damages as had been caused him in consequence of the corporation's cutting away the ridge north of A.'s farm, and thereby letting the river, in times of freshet, run through this cut and damage A.'s land. *Id.*
28. It is not sufficient, in proceedings to condemn real estate to the use of a railroad, for the appraisers to give notice to the occupant thereof, and award him damages, and ignore the rights of other parties in the premises. *Keyes v. Prescott*, 83 Vt. 86, explained and approved. *Hagar v. Brainerd*, 128.

LEASE.

As to the rights of a lessee of premises taken for railroad purposes, see MORTGAGES, 1, 2.

LEGISLATURE.

As to the power of the legislature to authorize private property to be taken for railway purposes, see **LANDS**, 25.

As to confirming fraudulent mortgage sales, see **MORTGAGES**, 15.

As to authorizing counties to aid railway companies, see **MUNICIPAL CORPORATIONS**, 5-12, 19-31.

MALICE.

That the existence of malice is a question for the jury, see **CARRIERS**, 49.

MANDAMUS.

1. Whenever there is a right which has been illegally and unjustly withheld, and there is no other specific adequate remedy, the writ of mandamus will be issued; and private persons as well the public are entitled to its benefits. *Mobile & Ohio R. R. Co. v. Wisdom*, 107.

2. When a railroad company received subscription taxes, and issued receipts therefor, under a statute specifically providing that the receipts should be receivable by the company for freight or passage,—*Held*, in the absence of other objections, that a writ of mandamus should issue to compel the company so to receive them, and that the right of the holder to sustain an action on the case against the company for its refusal to receive the certificates does not furnish him with such adequate remedy as to bar proceedings by mandamus. *Id.*

3. A mandamus should never be awarded except the relator has a clear legal right to have the thing sought by it done, and in the manner and by the person or body sought to be coerced, and must be effectual as a remedy if enforced, and it must be in the power of the party, and his duty also, to do the act sought to be done—the writ confers no new authority upon him,—and the duty must be a public one, and must be imperative and not discretionary. *People ex rel. Hempstead v. Chicago & Alton R. R. Co.*, 480.

As to when mandamus will be granted to compel the execution or delivery of municipal bonds, see **MUNICIPAL CORPORATIONS**, 13-16.

As to mandamus to compel a railroad company to carry and deliver grain, see **CARRIERS**, 87.

MASTER AND SERVANT.

1. In an action against a railroad company to recover for injuries received by the plaintiff by reason of the alleged negligence of the company, it was averred in the declaration that the accident happened while the plaintiff was acting as a brakeman

MASTER AND SERVANT—Continued.

on a freight train of the defendants, while the proof showed he was acting as brakeman in switching cars at a station, in making up a freight train. *Held*, there was no variance in respect to the character of the train. *Chicago & Northwestern R. Co. v. Jackson*, 569.

2. It is the duty of railroad companies to furnish their employees safe materials and structures to be used by the latter in the performance of their duties; and although the machinery employed upon a railroad may be furnished through the servants of the company, yet that fact will not relieve the company from their liability to the other employees, in different departments, who may receive injuries by reason of defective machinery. *Ib.*
3. So, where a brakeman on a freight train was injured in descending a ladder on one of the cars, in obedience to a signal from the engineer, the injury being occasioned by the absence of some rounds from the ladder, it was *Held*, the brakeman should not be prejudiced as to the right of recovery against the company, by the negligence of those servants of the company having charge of the inspection and repair of their cars, as they were superior to him in authority, and notice to them of the defect was notice to the company. *Ib.*
4. It is also the duty of the servants of the company to see that machinery used by them in the performance of their duties is in fit condition for use, and to report defects to the company; but this is subject to the qualification that the servant so using the machinery has knowledge of its defects, or, by reasonable precaution, might have such knowledge. *Ib.*
5. So if a brakeman on a freight train receives injuries in attempting to descend a ladder on one of the cars, on account of the absence of some rounds from the ladder, should it appear that the car having the defective ladder had been used while he was brakeman on the train of which it was a part, he would be presumed to know of its condition, and required to govern his conduct, in the use of the ladder, in reference to such defect. But whether the brakeman would be chargeable with such knowledge of the defect as to impair his right of recovery for the injuries, is a matter for the jury to determine from all the circumstances in proof. *Ib.*
6. In such a case the brakeman, in attempting to descend the ladder while the train was in motion, in obedience to a signal from the engineer, lost his hold by reason of the defect mentioned, and fell to the ground, the wheels of the cars passing over his legs and crushing them so that amputation became necessary. A verdict of eighteen thousand dollars recovered by

MASTER AND SERVANT—Continued.

- the brakeman was regarded so excessive that it should be set aside. *Ib.*
7. In such an action against the company, the plaintiff is entitled to compensation, not to vindictive damages, as corporations are not liable to more than compensatory damages, unless the injury is wanton or willful. *Ib.*
 8. Although the plaintiff was almost unfitted for business by reason of his injuries, yet the company should not have been required to render to him a sum which would produce a greater income than he could have earned had he not been injured. *Ib.*
 9. A master is bound to use due care and diligence in the selection and employment of his agents and servants, and for want of such care is responsible to all other servants for any damage that may arise. But in such case his responsibility is for his own negligence, and not merely for that of his servants. Hence an action against a railroad company for the killing of an employee by a co-employee, which charges that defendant failed to employ skillful servants, but fails to allege want of care and diligence in the selection of servants, is bad on demurrer. If the officers have made careful inquiry into the habits and competency of the employees, and upon such inquiry believe and have reason to believe them sober, competent and careful, they are not liable for the injuries resulting from the negligence of the co-employee. *Moss v. Pacific Railroad*, 576.
 10. And the mere allegation that defendant allowed its employees to neglect their duties, without alleging how or wherein, is not sufficient to charge liability on the company. *Ib.*

MORTGAGES.

1. A lessee of premises who puts a dwelling-house thereon by permission of the owner of the fee and with the right to move off the house at the expiration of the lease if the lessee complies with the terms of the lease, has such an interest in the realty as he or she may convey by mortgage. It is an interest in real estate, and the house and underpinning stones become attached to and a part of that interest. *Hagar v. Brainerd*, 128.
2. The plaintiff having a mortgage interest in the premises, had a right to show such interest by the deed and the proceedings to foreclose the same. *Ib.*
3. Whenever the condition of a mortgage is broken, at law the interest of the mortgagor in the premises thereupon becomes absolutely vested in the mortgagee, and he has a right to the immediate possession of the premises. *Ib.*
4. If T., who mortgaged to the plaintiff, had moved the house and

MORTGAGES—Continued.

- underpinning wall from the mortgaged premises, under the circumstances of this case, the plaintiff could maintain an action of trespass *qu. cl.* or an action on the case in the nature of waste against T. for such removal. *Ib.*
5. The defendants, who acquired the right of T. in the premises *in invitum*, for the use of their railroad, under the statute, are subject to the same liabilities to the plaintiff for such removal, he having had no notice of the proceedings to appropriate said premises, as T. would be for doing the same thing. *Ib.*
 6. In distributing the proceeds of a sale of a railroad, &c., the master is limited to *distributing* the fund to the parties entitled under the decree; he cannot go behind the decree to inquire whether the parties claiming are entitled to a position different from that which the decree assigns them. *McElrath v. Pittsburg & Steubenville R. R. Co.*, 189.
 7. There were a first and a second mortgage on a railroad. The trustee under the first filed a bill to foreclose and make the trustee under the second a party. A decree having been made postponing the second, a bondholder under it alleging error should ask for a review or a rehearing. *Ib.*
 8. Bondholders under such mortgages are not parties; the true party is the trustee, and he is to be summoned to defend the interest of those claiming under the mortgage. *Ib.*
 9. The bondholders are privies and may defend *pro interesse suo*, but their rights are affected by a decree against the trustee. *Ib.*
 10. The bondholder is not as a creditor claiming a right to attack the decree of an opposing creditor for collusion or fraud, between the plaintiff and defendant, but is affected by the decree against his own trustee. *Ib.*
 11. In the distribution it was competent for one to claim that he owned bonds entitled to a dividend, which were presented and claimed by another. *Ib.*
 12. Where a statute provides that a corporation shall be dissolved by a mortgage sale of its franchises and property, an illegal and fraudulent sale does not work a dissolution. *White Mountains R. R. v. White Mountains (N. H.) R. R.* 146.
 13. It is no objection to the maintenance of a bill in equity to compel a corporation to restore property acquired by fraud, that such restoration will cause a dissolution of the corporation. *Ib.*
 14. In 1853 the White Mountains Railroad mortgaged its franchises and property to trustees for the security of bondholders, the mortgages containing a power of sale. • In 1857 the trustees ap-

MORTGAGES—Continued.

plied to the supreme court for an order to sell. The mortgagors withdrew their opposition to such an order upon an agreement made by a combination of bondholders (intending to purchase at the sale), that the full value of the property should be accounted for to the mortgagors on their debts, irrespective of the price realized at the sale. In 1858 the trustees, having obtained a decree for a sale, sold the property to this combination of bondholders for much less than the real value. One of the trustees received a bribe from the purchasers to induce him to act for their interest at the sale, and he did so act. The purchasers formed themselves into a new corporation, and credited the mortgagors on their debts with only the price realized at the sale. The trustees made no return of their doings to the court. In 1859 the legislature passed an act confirming the sale. The mortgagors were ignorant of the bribery of the trustee until 1866, and did not learn until 1867 that the purchasers would not carry out their agreement to account for the real value on the debts. Upon demurrer to a bill in equity brought by the mortgagors in 1866,—*Held*, that, inasmuch as the mortgagors consented to a decree ordering a sale, the property would not be restored to them upon payment of the debts; but that the sale in 1858 was invalid as against the mortgagors, and that they were entitled to relief. *Id.*

15. The legislature has no power to confirm a fraudulent sale of the mortgaged property of a corporation. *Id.*

As to the effect of foreclosure of mortgages upon bonds secured thereby, see BONDS.

MUNICIPAL CORPORATIONS.

1. The power to open streets, as given in the charter of the city of Hannibal, includes the power to establish streets. *City of Hannibal v. Hannibal & St. Joseph R. R. Co.*, 40.
2. No petition by the property-holders is required by the charter of the city of Hannibal, in order to authorize proceedings for the establishment of streets in that city. *Id.*
3. Power to appropriate the property of a railroad in such a manner as to destroy or greatly injury its franchise, or render it impossible or very difficult to prosecute the object of its organization, cannot be inferred from the general grant of power to establish a road across its track, but such general grant is sufficient to warrant the laying of a road across its track whenever public necessity demands it; and as to whether that public necessity exists, the city council must be the judge. *Id.*

MUNICIPAL CORPORATIONS—*Continued.*

4. In proceedings for establishment of streets in the city of Hannibal, the city council of that city alone has jurisdiction. *Ib.*
5. The municipal corporations of this State have no authority in return for, or upon the basis of, the incidental benefits anticipated, to exercise the power of taxation in aid of private corporations building, or proposing to build, railroads to be owned and controlled by their corporators; and bonds issued by way of such aid, being incipient steps leading to taxation, are unauthorized. *People ex. rel. Bay City v. State Treasurer*, 96.
6. The taxing power of the State has certain definite limits, one of which is that the tax must be for a public purpose; and within the meaning of these words as employed to measure the authority of the State to demand and enforce the contributions of its citizens, a railroad in the hands of a private corporation is no more a public purpose than a manufactory, a newspaper establishment, or any other means for the carrying on by individuals of a business which, while private in its nature, nevertheless supplies a public need. *Ib.*
7. The legislature, therefore, can neither compel the taxation of municipalities in aid of railroad companies, nor empower them, in order to give such aid, to tax themselves or to contract indebtedness which must be paid by taxation. *People v. Salem*, 20 *Mich.* 452. *Ib.*
8. To take a man's property from him, under pretense of taxation, for a purpose for which taxation is not admissible, is an unlawful confiscation and not due process of law; and is therefore forbidden by Art. VI, § 32, of the constitution. *Ib.*
9. The power to impose such taxation could not come from, nor be aided by, the municipal votes. The legislature has exactly the same power to impose the taxation without the assent of the municipalities, that it has to permit it with their assent; and the permission granted to the municipalities to vote upon the question was matter of favor and not of right. *Ib.*
10. There is no mode in which aid to a railway running through many municipalities can be given by the taxation of all, consistently with any recognized theory of taxation, without an apportionment of the burden by some rule, or upon some basis, among them all; and this would be impossible under a system by which one township might tax itself ten per cent. of its valuation, another equally benefited by the same object refuse to pay but one, and the third decline altogether to bear any share of the common burden. *Ib.*
11. The State is precluded from loaning the public credit to private

MUNICIPAL CORPORATIONS—Continued.

- corporations, and from imposing taxation upon its citizens or any portion thereof in aid of the construction of railroads, by Art. XIV. §§ 7, 8 and 9, of our constitution. What the State cannot do in this regard directly, it cannot require its townships, cities and villages to do for it. *Ib.*
12. Constitutions are to be construed as the people construed them in their adoption, if possible; and the public history of the times should be consulted, and should have weight in arriving at that construction. *Ib.*
 13. When a municipality, under our railroad aid law (*Sess. L. 1869, 89*), has issued and deposited bonds in aid of a railroad with the State treasurer, who, on demand therefor, has declined to deliver the same to the proper authorities of such municipality, a writ of mandamus will be granted to compel such delivery. *Ib.*
 14. Where, in such case, there is nothing to indicate that the State treasurer, in awaiting the order of the court before delivering up the bonds as requested, was not acting in good faith under an honest misapprehension of his duty, the writ will issue without costs. *Ib.*
 15. Where bonds issued by a township on a subscription to the stock of a railroad company, are required by law to be countersigned by the town clerk before being delivered, such act of countersigning is a mere ministerial act, and it is not the province of such clerk, when called upon to do the act, to determine whether the proper steps have been taken to authorize the issuance of the bonds. *Houston v. People ex rel. Peoria & Rock Island R. Co.*, 104.
 16. So upon an application for a mandamus to compel a town clerk to countersign such bonds, which had been executed by the town supervisor, it was *Held*, the clerk could not set up matters affecting the legality of the steps required by law to be taken before the bonds could properly issue, as a reason for refusing to countersign them. The law provides another mode for determining such a question. *Ib.*
 17. Section 8 of an act of the legislature of Tennessee of 1852,—authorizing and regulating the subscription of counties for the stock of railroads, and providing for the collection of taxes to defray the subscription,—provides that the collector receiving such taxes shall issue a receipt which may be assigned, transferred, or traded, and be receivable for freight or passage over the road on which taxes so collected are expended. On a petition for mandamus to compel the defendant company to receive several of these certificates for passage of the holder

MUNICIPAL CORPORATIONS—Continued.

over a portion of its route,—*Held*, that the legal title and rights of such tax receipts may be as well transferred by delivery simply as by indorsement or assignment in writing. *Mobile & Ohio R. R. Co. v. Wisdom*, 107.

18. When a company has accepted subscriptions of counties under provisions of the law of 1852, received the taxes and issued tax receipts as required by section 8 of said act, it will not be permitted afterwards to deny its duty to accept the payment for freight or passage on the ground that it was organized, and its duties are defined by an act earlier than that of 1852. It has rendered itself subject to the conditions of this statute, by taking advantage of its benefits. *Id.*
19. The question whether the legislature possesses the power to authorize counties to grant aid to railroad companies by subscribing for stock therein, and issuing bonds in payment therefor, when it comes to the courts is purely a legal question, and the courts have nothing to do with the wisdom or policy of such legislation. *Leavenworth County v. Miller*, 259.
20. The legislature have no inherent power, but all their power is derived from the people through the constitution of the State. The people, in their primary capacity, possess all the political power of the State, and may themselves authorize counties to grant aid to railroad companies; or they may, if they choose, delegate this power to the legislature, and allow the legislature to grant such authority to counties. *Id.*
21. The legislature cannot exercise any power retained by the people, or not delegated by the people to the legislature. *Id.*
22. Section 8, article 11, of the constitution, which prohibits the State from ever being a party in carrying on any works of internal improvement, applies to the State in its sovereign corporate capacity, and not to the subordinate political subdivisions thereof. It prohibits the State as a State, and not counties, from being parties in carrying on any works of internal improvement. *Id.*
23. There is no express provision of the constitution which prohibits the legislature from authorizing counties to become stockholders in railroad companies, and issuing their bonds in payment for such stock. *Id.*
24. Chapter 12 of the laws of 1865, and other acts passed by the legislature of the State of Kansas authorizing counties and cities to subscribe for stock in railroad companies, and issue bonds in payment of the stock so subscribed for, are constitutional and valid. *Id.*
25. The power of the legislature to pass an act granting municipal

MUNICIPAL CORPORATIONS—Continued.

- aid to railroad companies must be found in the general grant of legislative power under section 1, article 2, of the constitution, which provides that the legislative power of the State shall be vested in the legislature, or not at all. *Id.*
26. At the time the constitution was framed, the term "legislative power" had a definite and precise signification with reference to this question, established by legislative, executive, and judicial construction, practice and usage, and the general understanding and signification was, that said term included the power to authorize municipal aid to railroad corporations; and therefore, in the absence of anything to the contrary, it must be presumed that the people of this State, when they framed their constitution, used said term with the signification generally given to it, and therefore that they intended to give to the legislature the power to pass acts authorizing municipal aid to railroad companies. *Id.*
 27. If it was the intention of the people that the constitution should give to the legislature the power to pass acts authorizing municipal aid to railroads, that instrument must be so construed by the courts; and the courts have no power to amend it, or change any of its provisions, or insert any new provisions in it, through the means of judicial construction or interpretation. *Id.*
 28. The aid given to a railroad company is not strictly for a private purpose, nor wholly for a public purpose, though the object intended by the legislature is a public purpose. *Id.*
 29. The government may accomplish a public purpose through the means of a private agency, a private individual or individuals, or a private corporation. It is the ultimate object to be obtained which must determine whether a thing is a public or a private purpose. The ultimate object of the government in granting municipal aid to railroads, is to increase the facilities for travel and transportation from one part of the country to the other, which object is in its nature a public purpose. *Id.*
 30. Taxation is the most universal power possessed by governments, being an incident and auxiliary of every other power, and may be resorted to whenever it is necessary to accomplish a public purpose, or to carry out any other power granted to the legislature. *Id.*
 31. If a railroad is made absolutely free for every one who chooses to ride and transport goods upon it, it is to be deemed and held as constructed for a public purpose, notwithstanding the government may allow a (in other respects) private corporation to own and operate it, and to receive a compensation there-

MUNICIPAL CORPORATIONS—Continued.

for, provided it is a road for which the government exercises the right of eminent domain, and retains the right to limit or restrict the compensation for freight and fare. *Ib.*

82. The localities along the line of a railroad may be taxed to aid its construction and operation, if they choose to take stock therein and issue bonds thereto; and a fair rule of apportionment, of which the taxpayers cannot complain, is, to allow the localities to be taxed the privilege of saying how much the benefit of the improvements is worth to them, and for what amount they are willing to be taxed. *Ib.*
83. The acts of the legislature of the State of Kansas authorizing counties and cities to subscribe for stock in railroad companies, and issue bonds in payment of the stock so subscribed for, are constitutional and valid. [Per VALENTINE, J., and KINGMAN, Ch. J., following *Leavenworth County v. Miller*, ante, p. 257.] *State ex rel. St. Joseph & Denver City R. R. Co. v. Commissioners of Nemaha Co.*, 819.

NEGLIGENCE.

1. A railroad company, in transferring two empty coal cars from the main to a side track, employed the mode known as the "running" or "flying switch," which is done by attaching the cars designed to be thrown upon the side track to the engine, when the train is put in motion running toward the switch, and before it is reached, and when sufficient momentum to answer the purpose has been acquired, the engine is detached and run ahead of the train, and after it passes, the switch is changed, and the cars thus detached, by the momentum thus acquired, are carried along the side track to the point intended. *Held*, in thus switching their cars in a populous part of a city of ten or twelve thousand inhabitants, crossing a traveled street and along an alley used by the public, the cars thrown upon the side track having a momentum which carried them at the rate of five miles an hour, the company were guilty of a high degree of negligence; and the fact that signals of alarm were given from the engine employed in the switching, intended for a person crossing the side track, who was injured by the cars, would not excuse them. *Illinois Central R. R. Co. v. Baches*, 585.
2. And it was gross negligence on the part of the brakeman on the train not to be at the brakes to respond to the signal of "down brakes," given by the engineer; or, being there, to fail to put on the brakes. As the company had adopted such dangerous mode of switching, it was imperative that the brakeman

NEGLIGENCE—Continued.

- should have been so situated as to see in front of his train, and to have full command of it, so as to have guarded, as far as possible, against inflicting injury. *Ib.*
3. In an action against a railroad company to recover for the death of a person occasioned by the alleged negligence of the defendants, an instruction which directed the jury, that in case they believed, from the evidence, that both the deceased and the agents and servants of the company were guilty of gross negligence contributing to the injury, they should find for the defendants, was *Held* to be proper, as embodying a correct legal proposition—that where both parties are guilty of gross negligence, as a general rule, liable, it may be, to some exceptions, the plaintiff cannot recover—and it was error for the court to modify it, no circumstances appearing in the evidence that called for or upon which to base the modification. *Ib.*
 4. Although the deceased in such case was guilty of negligence contributing to the injury, yet, if the defendants were guilty of a higher degree of negligence, with which, when compared, that of the deceased was greatly disproportionate or slight, the plaintiff might still recover. But if the negligence of deceased was equal to that of defendants, a recovery cannot be had. Being the duty of the former to use prudence and care, if he failed to do so, and was guilty of negligence, to authorize a recovery the negligence of the defendants must be clearly and largely in excess. *Ib.*
 5. Every person of ordinary intelligence is bound to know that a railroad passing over a public highway, where cars are frequently passing, is a place of more than ordinary danger, and should use, at such place, greater precaution to avoid injury than at a place of less hazard. While all persons have a right to cross a railroad track at its intersection with a public highway, it is their duty to do so with all reasonable despatch, and it would be negligence in an intelligent person to be on the track of a railway constantly used, unless for the purpose of crossing the same. *Ib.*
 6. If a person travel along a railroad track where cars are frequently passing, even for the purpose of crossing a public highway, unless the highway is so obstructed as to render it necessary to follow the railroad track, he is guilty of such negligence as will prevent a recovery for any injury he may receive, unless there is a higher degree of negligence contributing to the injury on the part of the employees of the road. *Ib.*
 7. In an action under the statute to recover for the death of a

NEGLIGENCE—Continued.

person caused by the wrongful act, neglect or default of the defendant, the only question to be determined in estimating the damages, is the pecuniary loss resulting from his death to the widow and next of kin of such deceased person. The feelings of the widow and next of kin, their wealth or poverty, or any other fact than the pecuniary injury, cannot be considered in assessing the damages. The fact that the widow is deformed and disabled can, in no wise, increase or diminish the amount of damages she may be entitled to recover. *Id.*

8. In such case the support the widow would have been likely to receive from her husband, had he not been killed, is a proper and the controlling element to be considered by the jury in arriving at the measure of compensation for the pecuniary loss sustained. *Id.*

As to negligence on the part of a passenger, contributing to an injury received by him, see **CARRIERS**, 50, 53, 56.

As to negligence of an employee of a railway company, causing injury to a fellow-servant, see **MASTER AND SERVANT**, 3-5, 9, 10.

NEW TRIAL.

As to when a new trial will be granted, see **APPEAL**; **CARRIERS**, 57.

NOTICE.

As to the obligation to notify the consignee of the arrival of goods, see **CARRIERS**, 26, 28.

As to notice of proceedings to condemn property for railroad purposes, see **LANDS**, 28.

OFFICERS.

As to the powers of officers of railway companies, see **CONTRACTS**.

PARTNERS.

As to the rights of partners where partnership property is taken for public purposes, see **LANDS**, 19.

PASSENGERS.

As to the obligation to carry passengers and their baggage, see **CARRIERS**, 8-13.

For the power to make rules in regard to passengers, see **CARRIERS**, 42-47.

As to liability for injuries to passengers, see **CARRIERS**, 48-50.

PENALTIES.

1. In an action to recover of a railroad company the penalty prescribed by section 2, chapter 109, Laws of 1862, for making

PENALTIES—Continued.

- excessive charges of freight or fare, it is not necessary for the plaintiff to show that the overcharge was *willful* on the part of the company. *Fuller v. Chicago & N. W. R. R. Co.*, 377.
2. Said section is not in conflict with the constitution of the United States (article 1, section 8) in that it seeks to regulate commerce between the several States. *Ib.*
 3. Act of 1862, section 2, chapter 169, Laws of the Ninth General Assembly, making railroad companies liable to a penalty for violations of its provisions, in failing to fix and post rates of fare and freight, and for overcharging, was not intended to deprive a person from whom overcharges were collected from recovering the amount paid him in excess of the rates fixed. He may, in an action against the company, recover the amount wrongfully collected and, also, the penalty provided by the act. *Fuller v. Chicago & North Western R. R. Co.*, 383.
 4. Whether the plaintiff could recover the overcharge if he know at the time of payment that it was in excess of the rates fixed, *query*. But if he were ignorant of that fact at the time, he could recover. *Ib.*
 5. The word "willfully," as used in said section, does not imply the idea of malice; and if it be shown that the railroad company designedly omitted to do the things enjoined by the act, it will be sufficient to fix its liability to the penalty prescribed. Whether such omission was by design or through mistake or inadvertence is a question of fact for the jury. *Ib.*
 6. Evidence of the plaintiff's declarations to the drayman who delivered the goods to him, to the effect that he thought the freight charges were too high, was held admissible on the part of plaintiff as showing a fact connected with the payment of the overcharge. *Ib.*
 7. The aforesaid section is not in conflict with article 1, section 8 of the constitution of the United States, on the ground that it infringes on the right of Congress to regulate commerce between the several States. Such acts are in the nature of police regulations indisputably within the legislative power of the State. *Ib.*

PLEADING.

- For requisites of a petition to recover damages resulting from defendant's negligence, see **CARRIERS**, 58.
- As to requisites of petition to acquire lands for railroad purposes, see **LANDS**, 1, 8, 11, 12, 15.
- As to averments in an action for damages to a railway employee from

PLEADING—Continued.

the negligence of the railway company or of a fellow servant, see **MASTER AND SERVANT**, 9, 10.

PLEDGE.

1. A bill in equity may be maintained to redeem a pledge, if an account is wanted, or if there has been an assignment of the pledge. *White Mountains R. R. Co. v. Bay State Iron Co.*, 158.
2. The pledgors of bonds secured by mortgages may redeem the bonds after the lapse of fifteen years, notwithstanding the pledgee has foreclosed the mortgages. *Ib.*

PRESUMPTIONS.

As to presumptions in regard to the compensation for carrying goods, see **CARRIERS**, 23.

In favor of the validity of Statutes, see **STATUTES**, 2.

PUBLIC USE.

As to the purposes for which private property may be taken, for the public use, see **LANDS**, 3, 4, 7; **MUNICIPAL CORPORATIONS**, 6-8, 29-31.

REDEMPTION.

As to redemption of bonds pledged, see **PLEDGE**.

SALES.

As to foreclosure sales, see **MORTGAGES**, 6-15.

STATUTES.

1. Where the provisions of an act are designed for the whole State, and every part thereof, such act has, in contemplation of section 17, article 2, of the constitution, a uniform operation throughout the State, notwithstanding the condition or circumstances of the State may be such as not to give the act any actual or practical operation in every part thereof. *Leavenworth County v. Miller*, 259.
2. All presumptions are in favor of the constitutional validity of a statute, and before the courts can declare it invalid, it must clearly appear to be unconstitutional. *Ib.*

STOCK.

1. A railroad corporation has authority to stipulate that each stockholder shall be entitled to interest on sums paid on stock subscriptions while its road is in process of construction, until it is completed and goes into operation, payable whenever the surplus earnings shall enable it properly to do so. *Richardson v. Vermont & Massachusetts R. R. Co.*, 115.

STOCK—Continued.

2. This arrangement for the payment of "interest dividends" is equitable and just; and such payment, made only out of the surplus earnings not needed for the payment of debts of the corporation or for the prosecution of its business, does not interfere with the rights of creditors nor contravene any principle of public policy. *Ib.*
3. The vote to pay such interest was passed at an annual meeting of the stockholders, the subject not being specially named in the notice calling the meeting. *Held*, without deciding whether the corporation had the right to pass such a vote, that the defect, if any, could be secured by subsequent ratification. *Ib.*
4. The subsequent action of the corporation in paying the interest to stockholders in pursuance of said vote, and the corporation and directors subsequently voting to issue certificates for the payment of said interest, and the action of the treasurer in issuing such certificates, constitute a ratification of such vote. *Ib.*
5. One of the by-laws of the defendant corporation provides that "at the annual meeting any matter may be acted upon within the power of the corporation." *Held*, therefore, that the proceedings of the corporation, terminating in the issuing of the interest certificates, created an obligation upon the corporation to pay according to the terms and conditions of such certificates. *Ib.*
6. Notwithstanding the stock for which seventy-five dollars and fifty dollars per share were paid was to be of equal rank and value as the other stock for which one hundred dollars per share was paid, yet in the matter of this interest such stockholders should be limited to "interest on all amounts paid by them," according to the language of the original vote, and are not entitled to interest upon the nominal value of one hundred dollars per share, and the certificates should be reduced accordingly. *Ib.*
7. There is not such a clear, complete and adequate remedy at law in this case as to require or justify the denial of relief in a court of equity on the ground that the remedy must be at law. *Ib.*
8. The ability of the corporation to pay which constitutes the contingency upon which these certificates are payable, must be ascertained in reference to the nature of the subject and the relative condition of the parties, and their duty to creditors having a paramount right. *Ib.*
9. The mere fact of the corporation having funds in its treasury sufficient in amount to pay the orators, would not be sufficient

STOCK—*Continued.*

to show the ability of the corporation contemplated in the vote and certificates. That ability must consist of a fund adequate not only for the payment of the claims of the orators, but for the payment of all other stockholders having like claims, and must be a surplus fund over and above what is requisite for the payment of the current expenses of the business, for discharging its duties to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the contingencies of its business. *Id.*

10. The orators' claims are in the nature of claims upon a particular fund upon which others have an equal claim, and to which another class of claimants may have a paramount right. The determination of the orators' rights might involve an accounting to ascertain the existence and the extent of the claims of others standing in like condition with the orators, &c., more appropriate for a court of chancery than for a jury in a court of law. *Id.*

As to taxation of corporate stock, see **TAXES**, 1.

SUBSCRIPTIONS.

As to subscriptions by municipal corporations to aid railroads, see **MUNICIPAL CORPORATIONS**, 5-33.

TAXES.

1. An assessment of stock of a railroad company in the name of the stockholders instead of that of the corporation, is irregular. But the action of the assessor in such case is judicial, and where it appears from the tax list that the assessor had jurisdiction over the property,—i. e., that it was liable to taxation in some form or other,—the collector would not be liable to the taxpayer for the amount collected under such assessment, notwithstanding its irregularity. In the case supposed the tax bill certified to the collector is a sufficient warrant, and will justify him in the proceeding. *St. Louis Mutual Life Ins. Co. v. Charles*, 47 Mo. 462, affirmed. *North Missouri R. R. Co. v. Maguire*, 43.
2. The convention ordinance of 1865, providing that an annual tax of ten and fifteen per cent. of the gross earnings of the North Missouri Railroad Company should be paid to the State in lieu of other taxation, and applied in payment of the debt due from the State on the bonds issued by the State to that company, is not repugnant to the constitution of the United States in any of the following particulars:
 1. It does not violate articles 5 and 7 of the amendments of the United States constitution. Those articles were not

TAXES—Continued.

designed as limitations upon State governments in respect to their own citizens, but exclusively as restrictions upon federal power.

2. The act of February 16, 1865, providing that the mortgage of the State on the North Missouri Railroad, taken to secure the amount guaranteed by the State to aid in the completion of the road, should be released and made a second lien, was a contract with the State. But the ordinance of 1865, referred to, did not impair the obligation of that contract between the railroad and the State. There is nothing in that act to prevent the State from exercising the sovereign right of taxation. The act does not pretend to grant exemption from taxation in express terms, and the courts will never presume that the State intends such exemption. Obviously the matter of taxation did not enter in the act, but was left where it was found before.

8. The ordinance is not unconstitutional by virtue of the clause imposing uniform taxation on all property. The ordinance itself is a part of the constitution, and cannot be nullified by the more general provision relating to the subject of taxation.

4. The ordinance of 1865 is not unconstitutional on the ground that the assessment is not in the nature of a tax. Although not levied and obtained directly for purposes of revenue, the assessment is a tax. It was raised for the purpose of paying the State's indebtedness. When money is once raised by taxation it is revenue, without regard to the purpose to which it is appropriated or applied. *North Missouri R. R. Co. v. Maguire*, 248.

3. The right of determining what proportion of the burdens of taxation shall be borne by any individual or class of individuals must be determined by the legislature, when there is no constitutional restriction. And the remedy, in case of unjust legislation, is to be found among the constituents of the legislators, and not in the judiciary. *Id.*
4. Chapter 125 of the Laws of 1869, or so much of it as provides for the assessment of railroad property by a board of county clerks, and that the entire road shall be assessed as a whole and apportioned to the different counties, townships, &c., through which the road runs, is not unconstitutional and void. *Missouri River, Fort Scott and Gulf R. R. Co. v. Morris*, 353.
5. Irregularities in the assessment made by the county clerks acting as a board, or acting separately under other statutes, will not render the taxes founded upon such assessment void. *Id.*
6. A deputy county clerk, in the absence of his principal, may act

TAXES—Continued.

as one of the "board of appraisers and assessors" to assess railroad property, as provided by chapter 124 of the Laws of 1869. *Id.*

7. A court of equity will not set aside such a tax, nor grant an injunction to restrain its collection, unless its collection would be inequitable and unjust; and the party seeking such a remedy must be prepared to do equity. *Id.*
8. A person against whom no illegal tax has been assessed or levied cannot, by injunction, restrain the collection of an illegal tax against another person. *Missouri River, Fort Scott and Gulf R. R. Co. v. Wheaton*, 375.
9. Injunction will not lie to restrain the commission of a pure, simple and naked trespass. If an officer holding a warrant for the collection of taxes assessed against A., levy such warrant on the property of B., the latter has his remedy by action of replevin against the officer, or by action for damages. *Id.*

As to when taxation in aid of railroads is authorized, see MUNICIPAL CORPORATIONS, 5-33.

TIME.

As to what is a reasonable time for delivery of goods by carrier, see CARRIERS, 1, 2.

TOWNS.

As to the issue of bonds by townships in aid of railroads, see MUNICIPAL CORPORATIONS, 15, 16.

TRIAL.

1. When a jury agree in advance to be bound by a verdict arrived at by each marking down a separate amount and dividing the aggregate thereof by twelve, the verdict will be held invalid, and set aside. *Fuller v. Chicago & N. W. R. R. Co.*, 377.
2. Affidavits of members of the jury are, in such case, admissible to show the manner in which the verdict was arrived at. *Id.*
3. Where a verdict arrived at in the manner above indicated is only void in part, the valid portion will be permitted to stand on the defendant's entering a remittitur as to the excess. *Id.*

VARIANCE.

As to variance between allegations and proofs, see CARRIERS, 54, 55; MASTER AND SERVANT, 1.

VERDICT.

As to the requisites of the verdict or finding of the jury, in pro-

VERDICT—Continued.

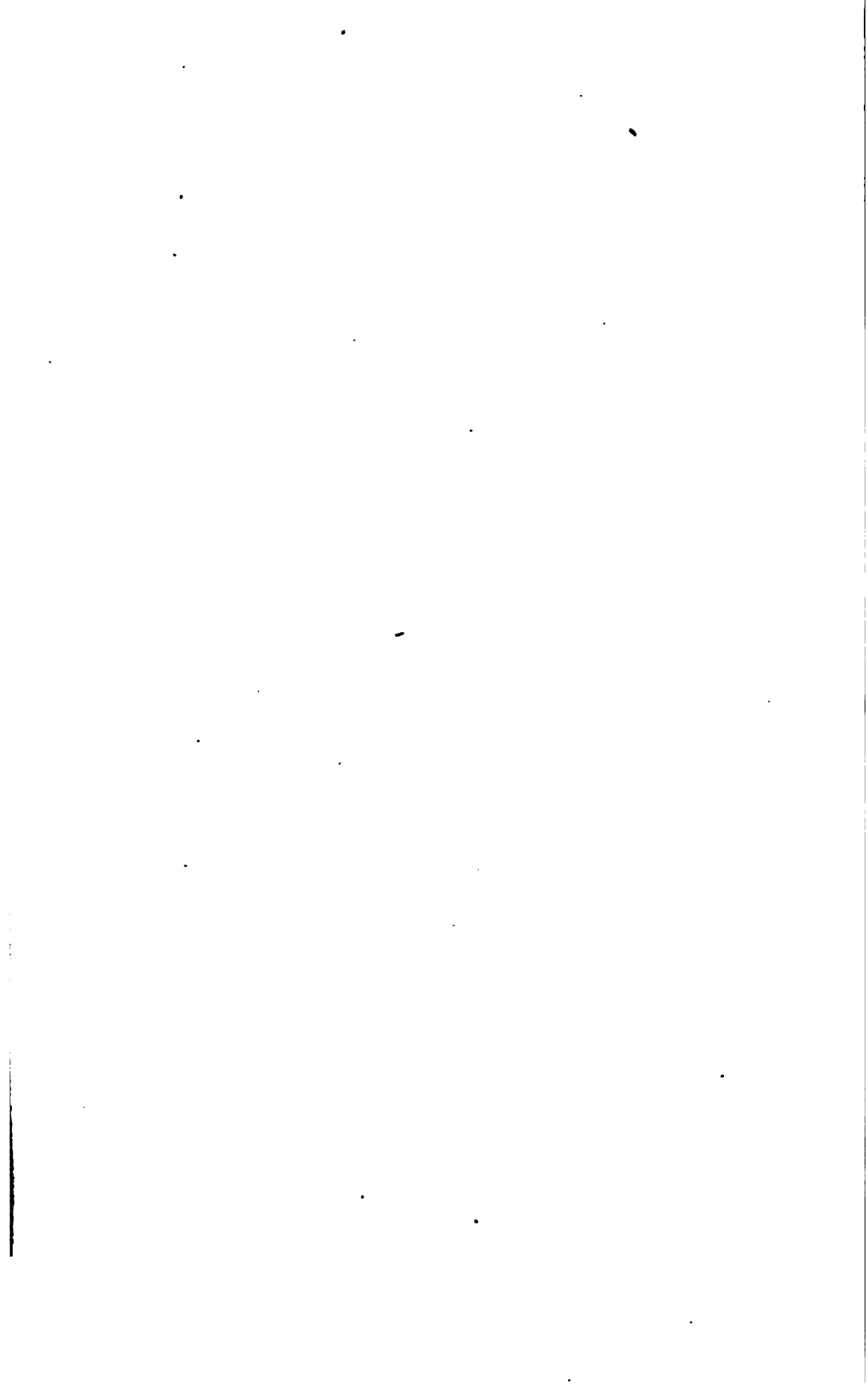
ceedings to acquire lands for railroad purposes, see **LANDS**, 2-4, 10.

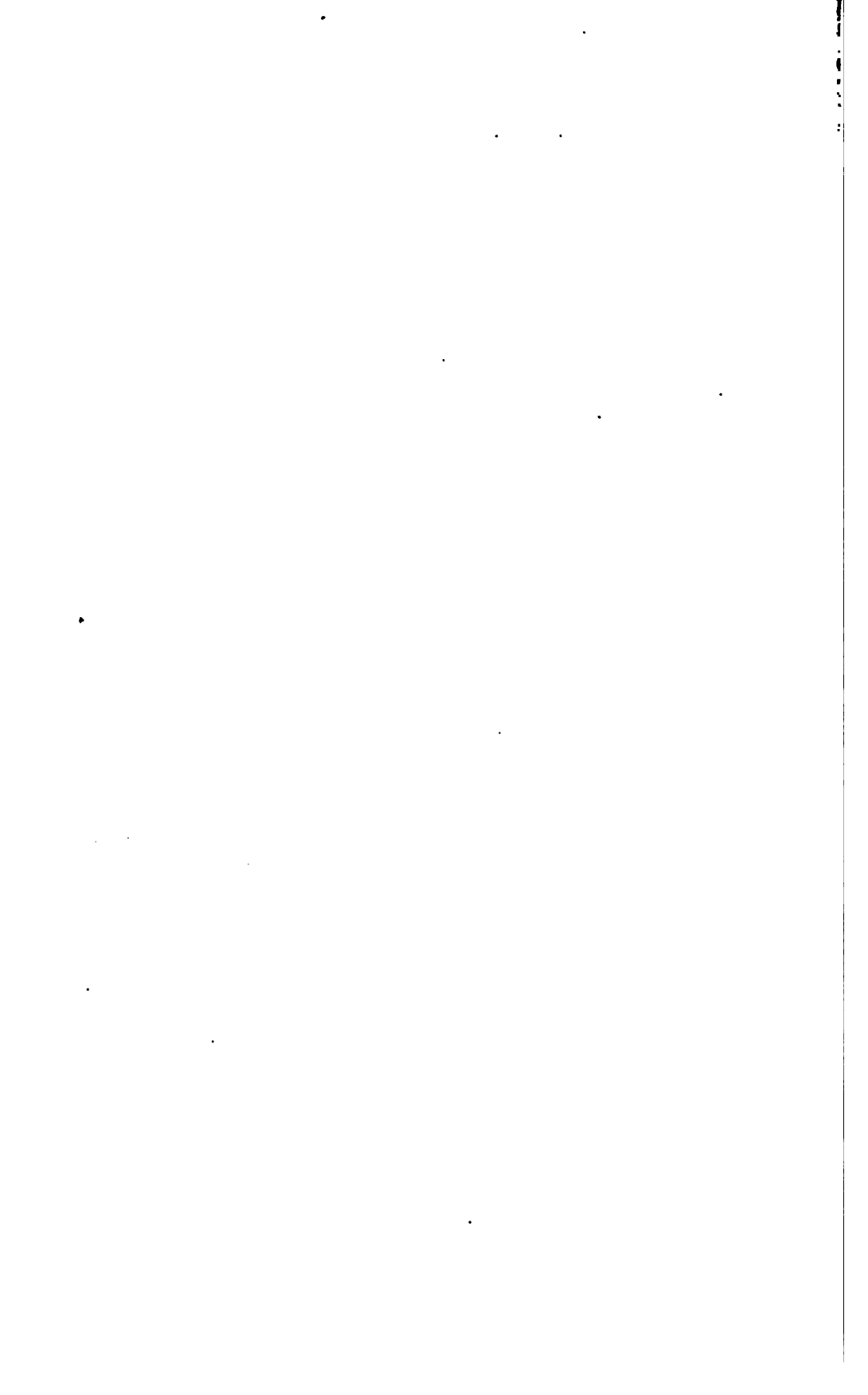
As to when a verdict should be set aside, see **APPEAL**; **CARRIERS**, 57; **TRIAL**, 1.

As to verdict void in part, see **TRIAL**.

WITNESSES.

1. In an action to recover damages of a railroad company for injury to a lot of flour during its transportation, the evidence of a witness who only saw a part of the flour examined at the place of destination, is admissible on behalf of plaintiff. The objection that the witness only saw a *part* of the flour examined, does not go to his competency. *Winns v. Illinois Central R. R. Co.*, 460.
2. Where the experience of a witness is of such a nature that it may be presumed to be within that of all men of common education moving within the ordinary walks of life, the evidence of opinion is improper. The jury must draw their own inference. *Gavist v. Pacific R. R. Co.*, 581.







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